No. 06-11543
Title: Larry Begay, Petitioner
v.
United States
Docketed: May 30, 2007
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (05-2253)
Decision Date: December 12, 2006
Rehearing Denied: February 21, 2007
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
May 22 2007	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due June 29, 2007)
Jun 21 2007	Order extending time to file response to petition to and including July 30, 2007.
Jul 30 2007	Brief of respondent United States in opposition filed.
Aug 9 2007	DISTRIBUTED for Conference of September 24, 2007.
Aug 15 2007	Reply of petitioner Larry Begay filed. (Distributed)
Sep 25 2007	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of amici curiae are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.
Nov 5 2007	Joint appendix filed. (Statement of costs received.)
Nov 5 2007	Brief of petitioner Larry Begay filed.
Nov 13 2007	Brief amicus curiae of National Association of Federal Defenders filed.
Nov 13 2007	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Nov 13 2007	Brief amicus curiae of Families Against Mandatory Minimums Foundation filed.
Nov 16 2007	SET FOR ARGUMENT ON Tuesday, January 15, 2008.
Nov 19 2007	CIRCULATED.
Dec 3 2007	Brief of respondent United States filed.
Dec 13 2007	Record received from U.S.C.A. for 10th Circuit. (1 envelope)
Dec 28 2007	Reply of petitioner Larry Begay filed. (Distributed)
Jan 4 2008	Record received from the U.S.D.C. for the District of New Mexico. (1 envelope)
Jan 15 2008	Argued. For petitioner: Margaret A. Katze, Assistant Federal Public Defender, Albuquerque, N. M. For respondent: Leondra R. Kruger, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

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06-11543

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2006

LARRY BEGAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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May 22, 2007

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2006

LARRY BEGAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

QUESTION PRESENTED FOR REVIEW

Is felony driving while intoxicated a "violent felony" for purposes of the Armed Career Criminal Act?

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2006

LARRY BEGAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Margaret A. Katze, Assistant Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this court and counsel for petitioner, Larry Begay, and that I personally mailed a copy of the petition for writ of certiorari to this court by first class mail, postage prepaid by depositing the original and ten copies in an envelope addressed to the Clerk of this Court, in the United States Post Office at 1135 Broadway Blvd. NE, Albuquerque, New Mexico, at approximately ____.m. on the 22d day of May, 2007.

_____

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2006

LARRY BEGAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Larry Begay respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming the mandatory minimum portion of his sentence imposed by the United States District Court for the District of New Mexico.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, *United States v. Begay*, 10th Cir. No. 05-2253, 470 F.3d 964 (10th Cir. 2006), affirming the application of the Armed Career Criminal Act ("ACCA") to Mr. Begay was filed on December 12, 2006. That opinion is attached as Appendix A to this petition. The February 21, 2007, Tenth Circuit order denying Mr. Begay's petition for rehearing is attached as Appendix B. The United States District Court for the District of New Mexico's July 29, 2005, judgment and

sentence is attached as Appendix C. The district court's memorandum opinion and order holding the Armed Career Criminal Act applied is attached as Appendix D.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Tenth Circuit Court of Appeals denied Mr. Begay's petition for rehearing on February 21, 2007. Pursuant to Supreme Court Rules 13.1 and 13.3 and 28 U.S.C. §2101(c), this petition is timely filed if filed on or before May 22, 2007.

FEDERAL STATUTORY PROVISION

The federal statutory provision involved in this case is:

18 U.S.C. § 924(e), which provides in part:

> **(1)** In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony ... committed on occasions different from one another, such person shall be ... imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> **(2)** As used in this subsection—...
>
> **(B)** the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, ... that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; ....

STATEMENT OF THE CASE

A. *Introduction*

The question whether felony driving while intoxicated ("DWI") is a "violent felony" under the Armed Career Criminal Act ("ACCA") has been squarely presented throughout the proceedings below. The district court held that Larry Begay's three felony DWI convictions rendered him subject to the ACCA's fifteen-year mandatory minimum on the grounds that felony DWI is a "violent felony" under the "otherwise" or residual clause of 18 U.S.C. § 924(e)(2)(B)(ii). A divided Tenth Circuit panel affirmed that holding. In a concurring opinion, Judge Lucero, while acknowledging the force of the dissent's argument, joined only a portion of Judge Hartz's opinion. Judge McConnell wrote a thoughtful, well-reasoned dissent.

B. *The District Court Proceedings*

In the United States District Court for the District of New Mexico, Mr. Begay pleaded guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). *United States v. Begay*, 470 F.3d 964, slip. op. at 1 (10th Cir. 2006)[1](Appendix ("App.") A). The presentence report determined that Mr. Begay's total adjusted offense level was 15 and he was in criminal history category VI, resulting in a guideline range of 41 to 51

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[1] Mr. Begay's references to the slip opinion are to Judge Hartz's opinion for the court unless otherwise indicated.

months. (Presentence Report ¶¶ 23, 24, 29, 30, 59, 84). *See* U.S.S.G. § 2K2.1(a)(6) & (b)(5), § 3E1.1(a) & (b), § 4A1.1, Ch. 5, Pt. A (Sentencing Table).

The government objected to the presentence report's failure to find Mr. Begay to be an armed career criminal under 18 U.S.C. § 924(e) based on his three prior felony DWI convictions. *See* N.M. Stat. Ann. § 66-8-102(G)-(J). The government contended felony DWI is a "violent felony" under the ACCA. The government pointed to § 924(e)(2)(B)(ii), which includes as a "violent felony" a crime that "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Without taking into account the crimes listed before the "otherwise" clause, the government asserted that, since DWI creates a serious potential risk of physical injury to another, it fits the ACCA definition. (Document[2] ("Doc.") 25 at 2-5; Doc. 26 at 2-5). Under § 924(e)(1), a mandatory minimum sentence of 15 years applied, and under U.S.S.G. § 4B1.4(b)(3)(A), a final total adjusted offense level of 31 was warranted due to the application of the ACCA, the government argued. (Doc. 25 at 5-6; Doc. 26 at 6).

Mr. Begay disagreed, arguing that a proper reading of the "otherwise" clause in light of its context and the legislative history of the ACCA establishes that DWI is not a "violent felony" because it is very unlike the other crimes listed before that clause, i.e., burglary, arson, extortion, and offenses involving use of explosives. (Doc. 27 at 1-5).

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[2] All references to documents are to documents in the district court record proper.

The district court agreed with the government. The court held that Mr. Begay's three felony DWI convictions were for violent felonies under the ACCA. App. A at 3; App. D. Accordingly, Mr. Begay was subject to a 15 year mandatory minimum, *see* § 924(e)(1), and a guideline range of 188 to 235 months, *see* U.S.S.G. Ch. 5. Pt. A (Sentencing Table). App. A at 3. The court imposed a sentence of 188 months—137 months above the top of the guideline range applicable absent the ACCA. App. A at 1; App. C at 2.

C. *The Tenth Circuit Proceedings*

On appeal to the Tenth Circuit, Mr. Begay challenged the application of the ACCA to his prior felony DWI convictions, raising the same arguments he raised below. As dissenting Judge McConnell explained, Mr. Begay's challenge presented the Tenth Circuit with a choice of two interpretations. App. A, Dissent at 5-7. Under the "all crimes" interpretation favored by the government, the "otherwise" clause of 18 U.S.C. § 924(e)(2)(B)(ii) covers any crime, regardless of its nature, that involves conduct presenting a serious risk of physical injury to another. Under the "similar crimes" interpretation favored by Mr. Begay, the residual clause is limited to crimes of a nature similar to the crimes enumerated before that clause—burglary, arson, extortion, and crimes using explosives—, i.e., crimes potentially involving violent, aggressive conduct.

The appeal prompted three opinions by the three judge panel. A majority adopted the "all crimes" approach, holding felony DWI is a violent felony under the ACCA[3]. Judge Hartz reasoned that the ordinary meaning of the phrase "conduct that presents a serious potential risk of physical injury" certainly includes DWI. App. A at 14. Judge Hartz opined that the term "violent felony" defined by that language and the short title of the statute—"The Armed Career Criminal Act"—does not override the meaning of the statutory definition itself. App. A at 14-15. Judge Hartz posited that that definition served the purpose of imposing long terms of imprisonment on those who have displayed contempt for human life, not just those whose prior crimes would be more dangerous by the possession of a firearm. App. A at 15-18. Judge Hartz found unhelpful the ACCA's legislative history and canons of statutory construction. App. A at 22.

Judge Lucero joined only in that part of Judge Hartz's opinion regarding the ordinary meaning of the "otherwise" clause. App. A, Concurrence ("Con."). Judge Lucero believed the statute's language, in particular the word "otherwise," is so unambiguous it does not allow consideration of the legislative history. *Id.*. Judge Lucero acknowledged dissenting Judge McConnell was "right to highlight the dramatic increase in sentence" Mr. Begay received as a result of the ACCA's application and he agreed with Judge McConnell that

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[3] The Tenth Circuit remanded for resentencing on the ground that the district court had misunderstood its discretion under *United States v. Booker*, 543 U.S. 220 (2005), to sentence at or above the mandatory minimum, but below the guideline range. App. A at 23-27.

DWI "may not have been in the minds of the 1986 amendment's sponsors when they drafted the residual language in § 924(e)(2)(B)(ii)." *Id.*. Nevertheless, Judge Lucero felt the statute's wording clearly covered DWI. *Id.*.

In dissent, Judge McConnell noted the more than threefold increase in Mr. Begay's sentence from a guideline range of 41 to 51 months to over 15 years. App. A, Dissent at 1. Judge McConnell found the statutory language was capable of both the "all crimes" and the "similar crimes" interpretation, with the "similar crimes" interpretation being the more likely. App. A, Dissent at 5-7. Judge McConnell determined a number of statutory construction tools all supported the latter interpretation. App. A, Dissent at 3-4, 8-18. Judge McConnell pointed to: the phrase "violent felony" defined by the "otherwise" clause; the history and purpose of the ACCA—to keep firearms out of the hands of those who commit serious crimes as a means of livelihood and whose crimes would be more dangerous if committed with a firearm—; the specific legislative history; the well-established canons of statutory construction *noscitur a sociis* and *ejusdem generis*; the "all crimes" interpretation's violation of another canon of construction that disapproves of surplusage; and, if necessary, the rule of lenity. App. A, Dissent at 3-4, 8-18. Judge McConnell concluded the ACCA's residual clause covers only those "violent, active" crimes, like burglary, arson, extortion, and crimes involving explosives, that are "typical of career criminals, and which are more dangerous when committed in conjunction with firearms." App. A, Dissent at 16, 18. Accordingly,

Judge McConnell maintained, felony DWI is not a "violent felony" under the ACCA. App. A, Dissent at 18.

Mr. Begay filed a petition for rehearing en banc. With Judge McConnell dissenting, the Tenth Circuit denied the petition without explanation. App. B.

ARGUMENT FOR ALLOWANCE OF THE WRIT

This case presents an important question of federal law that has not been, but should be, settled by this Court: is felony driving while intoxicated a "violent felony" for purposes of the Armed Career Criminal Act.

A. *Introduction*

This Court should grant certiorari in this case because it squarely presents an important question of federal law: whether felony driving while intoxicated ("DWI") is a "violent felony" for purposes of the Armed Career Criminal Act ("ACCA"). Application of the fifteen year minimum sentence mandated by the ACCA dramatically increases the sentence a defendant convicted of possessing a firearm in violation of 18 U.S.C. § 922(g) receives. If felony DWI is a "violent felony" under the ACCA, as a majority of the Tenth Circuit panel decided in this case, many defendants will suffer those severe consequences, given the prevalence of felony DWI statutes and DWI convictions. As the three different opinions of the Tenth Circuit in this case illustrate, the issue whether felony DWI is an ACCA predicate felony involves significant statutory construction principles relevant in non-ACCA contexts. As Judge McConnell's thoughtful, well-reasoned dissent demonstrates,

powerful arguments support a resolution of the issue Mr. Begay raises that is different from the Tenth Circuit majority's.

On a number of occasions this Court has considered cases involving the ACCA. *See Shepard v. United States*, 544 U.S.13 (2005); *Daniels v. United States*, 532 U.S. 374 (2001); *Custis v. United States*, 511 U.S. 485 (1994); *Taylor v. United States*, 495 U.S. 575 (1990). Most recently, in *James v. United States*, 127 S.Ct. 1586 (2007), this Court addressed the question whether attempted burglary, as defined by Florida law, fell within the ACCA's residual provision for crimes that "otherwise involv[e] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). This case presents the question whether that same "otherwise" clause includes felony DWI. In *James*, the kind of risk associated with the prior offense was similar to the confrontational risk associated with the enumerated offenses. In this case, the DWI risk is not the same kind of risk associated with those enumerated offenses. Thus, this case provides an opportunity for this Court to further clarify the meaning of the ACCA.

For all of these reasons, this court should grant certiorari in this case.

B. *The ACCA*

The ACCA requires the imposition of a mandatory minimum sentence of 15 years on a defendant convicted of a violation of 18 U.S.C. § 922(g)—a statute that prohibits firearm possession by certain categories of people—who has a total of three prior convictions for certain offenses. Those offenses are "serious drug offenses" that carry a maximum sentence

of at least ten years and "violent felonies." 18 U.S.C. § 924(e). The term "violent felony" means:

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

18 U.S.C. § 924(e)(2)(B). The question raised in this case is whether Congress intended to include felony DWI in the phrase "otherwise involves conduct that presents a serious potential risk of physical injury to another."

C. ***This case involves a question of great importance.***

The question this case raises—whether felony DWI is a "violent felony" under the ACCA—is an exceptionally important question that merits this Court's consideration. First, as Judge Lucero's and Judge McConnell's opinions indicate, App. A, Con.; App. A, Dissent at 1, defendants suffer dramatic increases in sentences as a result of the ACCA's application. A defendant with a guideline range that includes or exceeds the ten year maximum sentence for violating 18 U.S.C. § 922(g), *see* 18 U.S.C. § 924(a)(2), receives at least an additional five years of imprisonment, and more likely much more under the Sentencing Guidelines, *see* U.S.S.G. § 4B1.4(b)(3)(raising the offense level to 33 or 34), when the sentencing court employs the ACCA. More typically, a defendant whose prior offenses were felony DWIs

would be in a guideline range close to the one Mr. Begay was in—41 to 51 months—based on a total adjusted offense level of 15 and a criminal history category VI. (PSR ¶ 84). U.S.S.G. § 2K2.1(a)(6) provides for a base offense level of 14 where the defendant is a prohibited person who has no prior convictions for crimes of violence or controlled substance offenses. Under the ACCA, the typical felony DWI, § 922(g) defendant would receive a sentence more than three times as high as the top of the guideline range and more than four times as high as the low end. The guideline range could be as high as 235 months or more, as in this case. App. A at 3. In this case, the district court imposed a 188-month sentence. Thus, the issue whether felony DWI is a "violent felony" under the ACCA is extremely important to felony DWI, § 922(g) defendants and to the criminal justice system.

Second, many defendants will suffer the dramatic consequences of a decision that the ACCA covers prior felony DWIs. All but three states have adopted felony DWI statutes. See MADD, *MADD-NC 2006 Legislative Updates* available at www.madd.org/home/3337 (last visited May 22, 2007). In 2003, approximately 1.4 million drivers were arrested for driving under the influence of alcohol or narcotics. United States Department of Labor, *Impaired Driving*, www.dol.gov/asp/programs/drugs/workingpartners/sp_iss/safetyfacts.asp (last visited May 22, 2007).

Already three circuit courts, including the Tenth Circuit three times, have been faced with a defendant whose sentence was drastically enhanced due to the application of the ACCA to felony DWIs. *See Begay*; *United States v. McCall*, 439 F.3d 967 (8th Cir. 2006)(en

banc); *United States v. Sperberg*, 432 F.3d 706 (7th Cir. 2005); *United States v. Morris*, 2007 WL 1430307 (10th Cir. May 16, 2007)(unpub'd); *United States v. Gwartney*, 2006 WL 2640616 (10th Cir. 2006)(unpub'd), *cert. denied*, 2007 WL1174377 (April 23, 2007). A number of circuit courts have dealt with defendants whose sentences were enhanced by virtue of the sentencing guideline career offender provisions, see U.S.S.G. § 4B1.2(a)(2), due to prior felony DWI convictions. *United States v. Veach*, 455 F.3d 628 (6th Cir. 2006); *United States v. McGill*, 450 F.3d 1276 (11th Cir. 2006), *cert. denied*, 127 S.Ct. 1160 (2007); *United States v. Moore*, 420 F.3d 1218 (10th Cir. 2005); *United States v. Walker*, 393 F.3d 819 (8th Cir. 2005), *overruled by, McCall*; *United States v. DeSantiago-Gonzales*, 207 F.3d 261 (5th Cir. 2000). The resolution of the question whether felony DWI is a "violent felony" under the ACCA impacts a significant and growing number of defendants.

Third, as the differing thoughtful opinions in this case and in the Eighth Circuit en banc *McCall* case illustrate, the issue this case presents precipitates a wide-ranging exploration of statutory construction issues: what is plain language; what is ordinary meaning; when should an interpreting court look beyond the statutory language; what is the significance of the generic term defined by the statutory language; what is the significance of the short title of an act; what are the purposes of the ACCA; what role does legislative history play; when and how do the construction canons of *noscitur a sociis* and *ejusdem generis* apply; when may the rule of lenity be invoked. Review of these issues has implications beyond the resolution of the particular question Mr. Begay raises. Thus, this

case presents an opportunity for this Court to address important statutory construction principles.

Because resolution of the issue this case raises—whether felony DWI is a "violent felony" under the ACCA—will dramatically affect many defendants and involves weighty statutory construction issues, this Court should grant certiorari, as it did for the question whether attempted burglary under Florida law was a "violent felony" under the ACCA. *See James*.

D. *There are strong reasons to believe the circuit courts of appeals have decided the issue incorrectly.*

As Judge McConnell's dissent in this case and the three-judge dissent in *McCall*, 439 F.3d at 974-983 (Lay, J., joined by Wollman and Bye, JJ., dissenting), demonstrate, there are strong reasons to believe the Seventh, Eighth and Tenth Circuits have decided incorrectly the question Mr. Begay presents. Judges McConnell and Lay set forth powerful arguments why felony DWI is not a "violent felony" under the ACCA, based on: the language itself; the phrase "violent felony" defined by the "otherwise" clause; the history and purpose of the ACCA; specific legislative history; the well-established canons of statutory construction that require judging language by its company and discourage interpretations that render words superfluous; and, if necessary, the rule of lenity. App. A, Dissent at 3-18; *McCall*, 439 F.3d at 974-983.

This Court has recently stressed "the cardinal rule that statutory language must be read in context." *Lopez v. Gonzales*, 127 S.Ct. 625, 631 (2006)(quoting *General Dynamics Land*

Systems, Inc. v. Cline, 540 U.S. 581, 596 (2004)). In interpreting the residual clause in the "violent felony" definition "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another," *see* 18 U.S.C. § 924(e)(2)(B)(ii), the clause must be read in light of the enumerated crimes that precede it. As Judge McConnell pointed out, App. A, Dissent at 7, by using the word "otherwise," Congress indicated a substantive connection between the listed crimes and the general phrase. Congress limited ACCA coverage to "felonies that, while not identical to burglary, arson, extortion, or explosives offenses, impose a similar sort of risk." *Id.*.

The Tenth Circuit panel majority's contrary interpretation suffers from at least two major flaws. First, to interpret the "otherwise" clause to include all crimes, without limitation, that present a serious potential risk of physical injury to another, renders the word "otherwise" and much of the rest of the definition of "violent felony" superfluous, contrary to a well-established rule of construction that every word should have a meaning if at all possible. App. A, Dissent at 7; *McCall*, 439 F.3d at 978. See *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004). Second, if one does accord the meaning the Tenth Circuit panel majority apparently accords to "otherwise," i.e., "in a manner different from," App. A at 22, the definition does not conform to the meaning the majority attributes to it. Under that interpretation, the "otherwise" clause only applies when the risk is created in a manner different from how the risk is created when the enumerated crimes are committed. Surely, the Tenth Circuit did not read the "otherwise" clause in that manner.

The word "otherwise" does not plainly mean what the Tenth Circuit says it does. On a number of occasions, courts, including this Court, have interpreted "otherwise" to mean "similar" to other entities. *See Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979)("otherwise qualified" disabled person means the person is qualified for the position in the same way as non-disabled people are); *United States v. Mississippi*, 380 U.S. 128, 136-138 (1965)("otherwise qualified" voters means voters who are as qualified as voters of a different race); *Huguley Manufacturing Company v. Galeton Cotton Mills*, 184 U.S. 290, 295 (1902)(that a case may be brought by "certiorari or otherwise" means the manner of reaching the Court must be *ejusdem generis* with certiorari); *Pollgreen v. Morris*, 911 F.2d 527 (11th Cir. 1990)("represented by counsel or otherwise" referred to representation that was similar to that of counsel); *United States v. Philipp Overseas, Inc.*, 651 F.2d 747, 751 (C.C.P.A. 1981)(in the phrase "drilled, punched or otherwise advanced," "otherwise advanced" refers to an activity that is *ejusdem generis* with drilling and punching); *Comar Oil Company v. Helvering*, 107 F.2d 709, 711 (8th Cir. 1939)("otherwise" must be construed as limited by the rule *noscitur a sociis*). The ordinary or plain meaning of the "otherwise" clause does not support the Tenth Circuit's position.

On the other hand, as Judges McConnell and Lay have pointed out, App. A, Dissent at 3-4, *McCall*, 439 F.3d at 981-982, the term the "otherwise" clause defines—"violent felony"—strongly supports the "similar crimes" interpretation of that clause. As then-Circuit Judge Breyer explained, speaking for the First Circuit, after opining that Congress did not

intend the residual clause of the ACCA to include drunk driving, he stated: "we must read the ["otherwise" clause] definition in light of the term to be defined, 'violent felony,' which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992). This Court quoted that analysis approvingly in support of its decision in *Leocal*, 543 U.S. at 11. App. A, Dissent at 3-4; *McCall*, 439 F.3d at 982.

Likewise, the history and purpose of the ACCA, as this Court related in *Taylor*, 495 U.S. at 581-590, argue for including only crimes that might involve aggressive, violent conduct within the "otherwise" clause. In enacting the ACCA, "Congress focused on career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Id.* at 587-588. As Judge McConnell concluded, "it seems beyond question that drunk drivers fall outside any reasonable understanding of Congress's definition of an "armed career criminal." App. A, Dissent at 8-9. "Drunk drivers do not drive drunk 'as their means of livelihood,' and the threat they pose to other persons has nothing to do with whether they possess weapons." App. A, Dissent at 9.

The specific legislative history with respect to the "otherwise" clause also powerfully suggests the "similar crimes" interpretation is appropriate. App. A, Dissent at 9-12; *McCall*, 439 F.3d at 979-981. The House Committee on the Judiciary discussed the legislation as follows:

> The other major question involved in these hearings was as to what violent felonies involving physical force against *property* should be included in the definition of 'violent' felony. The Subcommittee agreed to add the crimes punishable for a term exceeding one year that involve conduct that presents a serious risk of physical injury to others. This will add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and *similar* crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person.

Taylor, 495 U.S. at 587 (quoting H. R. Rep. No. 99-849, p. 3 (1986))(first emphasis in original, second emphasis added). This Congressional explanation "makes clear that Congress intended the expanded definition to cover only ... crimes 'similar' to burglary, arson, extortion, and use of explosives." App. A, Dissent at 10. *See also McCall*, 439 F.3d at 980.

Two well-established canons of statutory construction—*noscitur a sociis* and *ejusdem generis*—also support that conclusion. Under those doctrines, the meaning of the "otherwise" clause must be tied to the specific terms it accompanies, i.e. it is restricted to violent, active crimes like those listed, not like drunk driving. App. A, Dissent at 16. *See also James*, 127 S.Ct. at 1594 (noting that the specific offenses enumerated in clause (ii) provide one baseline from which to measure whether "similar conduct" presents the requisite risk of physical injury); *id.* at 1595 (noting attempted burglary "poses the same kind of risk" as the enumerated crime of burglary). Finally, even if after all the above analysis, the "otherwise" clause was ambiguous, the rule of lenity would require a holding that felony

DWI is not a predicate felony under the ACCA. App. A, Dissent at 17-18; *McCall*, 439 F.3d at 983.

As Judge McConnell concluded: "The 'similar crimes' interpretation thus finds support in an impressive array of interpretive methods: ordinary meaning, avoidance of surplusage, consistency with general statutory purposes, specific legislative history, and two canons of statutory construction, plus the rule of lenity." App. A, Dissent at 18. Extremely forceful reasons exist why the circuit courts addressing the matter have wrongly decided the exceptionally important question whether felony DWI is a "violent felony" under the ACCA. This court should resolve that question.

E. *This Court has evidenced its appreciation of the important implications of the ACCA.*

This Court has recognized the importance of the ACCA in the federal criminal justice system by addressing questions that arose in the ACCA context. *See James*; *Shepard*; *Daniels*; *Custis*; *Taylor*. In *James*, *Shepard* and *Taylor*, this Court interpreted various aspects of the ACCA. In *James*, this Court interpreted the very same "otherwise" clause that requires interpretation in this case. As this Court observed in that case, *id.*, 127 S.Ct. at 1595, the Florida attempted burglary offense involved in *James* poses the same kind of risks of physical injury that the enumerated offenses preceding the "otherwise" clause pose. In this case, on the other hand, DWI creates a completely different kind of risk than the confrontational risk the active, violent, enumerated offenses create. Consequently, this case presents an opportunity for this Court to once again interpret the ACCA, and in particular the

residual clause of 18 U.S.C. § 924(e)(2)(B)(ii), but in a meaningfully different context. This Court should take advantage of that opportunity.

F. ***This Court should grant certiorari.***

This case squarely presents an important federal question of law the resolution of which will have profound ramifications for many criminal defendants: whether felony DWI is a "violent felony" under the ACCA. The circuit courts addressing the question have so far incorrectly determined that the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) applies to DWI, despite strong dissents, including Judge McConnell's in this case. This case provides an ideal opportunity for this Court to explore a number of statutory construction principles and continue to clarify the implications of the ACCA. For these reasons, this Court should grant certiorari.

CONCLUSION

For the reasons stated above, petitioner Larry Begay requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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_____
Margaret A. Katze
Attorney for Petitioner

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2006

LARRY BEGAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, Margaret A. Katze, Assistant Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this court and, as counsel for Larry Begay, I personally mailed copies of the motion for in forma pauperis and the petition for writ of certiorari by first class mail, postage prepaid to the Solicitor General, Department of Justice, Washington, DC 20530, and to Assistant United States Attorney David N. Williams, P.O. Drawer 607, Albuquerque, NM 87103, this 22d day of May, 2007.

_____

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No. 06-11543

IN THE SUPREME COURT OF THE UNITED STATES

LARRY BEGAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior felony convictions for driving while intoxicated qualify as "violent felonies" under 18 U.S.C. 924(e).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A46) is reported at 470 F.3d 964. The opinion of the district court (Pet. App. D1-D7) is reported at 377 F. Supp. 2d 1141.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2006. A petition for rehearing was denied on February 21, 2007 (Pet. App. B1). The petition for a writ of certiorari was filed on May 22, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of New Mexico, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). The district court determined that petitioner had at least three prior convictions for "violent felonies" as defined by the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e), and it sentenced him to 188 months of imprisonment under that Act. The court of appeals affirmed.

1. In September 2004, after a night of heavy drinking, petitioner pointed a .22 caliber rifle at Helen Begay, a family member, and threatened to kill her if she would not give him some money. When she replied that she had no money, petitioner repeatedly pulled the rifle's trigger. The rifle, fortunately, was not loaded. Petitioner then approached his sister, Annie Begay, and threatened her with the rifle in a similar fashion. Petitioner was subsequently arrested and charged with one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). He pleaded guilty to that offense. Pet. App. A2, D2; see Gov't C.A. Br. 2-3; Presentence Report (PSR) ¶¶ 1-4, 8-17.

2. At sentencing, the district court found that petitioner qualified for a sentencing enhancement under the ACCA, which provides for a mandatory minimum 15 years of imprisonment for a defendant who (a) is convicted of possessing a firearm as a felon

and (b) has three previous convictions for a "violent felony." The statute defines "violent felony" to include burglary, arson, extortion, an offense involving the use of explosives, or an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

It was undisputed that petitioner had at least 12 convictions in the State of New Mexico for driving while intoxicated (DWI), in violation of N.M. Stat. Ann. § 66-8-102.[1] Pet. App. A2-A3, A29, D2. It was likewise undisputed that at least three of those convictions were felony DWIs. Ibid. Petitioner argued, however, that the convictions could not be considered "violent felonies" under the ACCA. Id. at D4. The district court rejected that contention, concluding with "no difficulty" that the convictions "involve conduct that presents a serious potential risk of physical injury to another." Id. at D7. Having so concluded, the court found that petitioner was subject to a mandatory minimum of 180 months of imprisonment, 18 U.S.C. 924(e)(1); a base offense level of 34, Sentencing Guidelines § 4B1.4 (specifying base offense level for defendant "subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e)"); and a Guidelines imprisonment range of 188

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[1] In addition, petitioner was arrested at least ten other times for drunk driving. Pet. App. D2.

to 235 months.[2] Sent. Tr. 13-14; see Pet. App. A3. The court sentenced petitioner to 188 months of imprisonment, to be followed by three years of supervised release. Pet. App. C2-C3.

3. A divided court of appeals affirmed in relevant part.[3] Pet. App. A1-A46.

a. The court noted at the outset (Pet. App. A5) that Taylor v. United States, 495 U.S. 575 (1990), mandates a "categorical approach" to determining whether a prior offense is a "violent felony" under the ACCA, such that the court was bound to "look only to the statutory definition" of that offense. Turning to the conduct prohibited by N.M. Stat. Ann. § 66-8-102, the court concluded that driving while intoxicated "otherwise involves conduct that presents a serious potential risk of physical injury to another," such that DWI falls within the "ordinary meaning" of Section 924(e)(2)(B)(ii). Pet. App. A5, A15; see id. at A14 ("DWI

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[2] Absent the ACCA enhancement, petitioner's advisory Guidelines range of imprisonment would have been 41 to 51 months. See Pet. App. A29.

[3] Although the court of appeals affirmed (by a vote of two to one) the district court's application of the 180-month mandatory minimum pursuant to the ACCA enhancement, it unanimously held that the district court had erred in imposing a 188-month sentence on the understanding that, "in order for me to go below the guidelines, I have to make a finding that * * * [a] sentence of 188 months [would be] unreasonable." Pet. App. A4, A24, A46. The court of appeals remanded for resentencing on the ground that a sentencing court "may impose a non-Guidelines sentence if the sentencing factors set forth in [18 U.S.C.] 3553(a) warrant it, even if a Guidelines sentence might also be reasonable." Pet. App. A24, A27.

certainly presents such a risk. Many would say that the gravest risk to their physical safety from criminal misconduct is from drunken drivers.").

b. In separate opinions, the two judges in the majority (Judge Lucero and Judge Hartz) rejected petitioner's contention (Pet. App. A6) that the ACCA's "otherwise" clause extends only to those offenses that are similar to the enumerated crimes of burglary, arson, extortion, and offenses involving explosives.

In an analysis that Judge Lucero did not join, Judge Hartz concluded that the "otherwise" clause could not bear the narrow "similar crimes" interpretation that petitioner advocated, given (inter alia) that (1) the ACCA's broad statutory purpose is to punish more severely those felons in possession "who have a confirmed history of displaying contempt for human life or safety," such that "there is nothing remarkable about including felony DWI as a 'violent felony,'" Pet. App. A17; (2) the circuits that have addressed the matter have unanimously held that the similarly-worded "otherwise" clause in Sentencing Guidelines § 4B1.2(a)(2) encompasses DWI, Pet. App. A17-A18[4]; (3) the legislative history of Section 924(e)(2)(B)(ii) shows that the specific crimes of

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[4] Section 4B1.2(a)(2) defines the term "crime of violence," for purposes of the Guidelines' career offender provision, to include burglary of a dwelling, arson, extortion, offenses involving the use of explosives, and offenses that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another."

burglary, arson, extortion, and offenses involving the use of explosives were added to the provision only after introduction of the general language "involves conduct that presents a serious potential risk of physical injury to another," which chronology suggests that "the addition of the specific language was [simply] to make clear * * * that the term violent felony encompassed the newly listed offenses" in addition to a wide range of other safety-threatening offenses like DWI, Pet. App. A19-A20; and (4) the "primary definition" of the word "otherwise" is "in a different way or manner," such that the clause that follows that word is properly understood to include "conduct that presents (in a manner different from burglary, arson, etc.) a serious risk of physical injury to another," id. at A22. Judge Hartz further concluded (id. at A20-A22) that the interpretive canons of ejusdem generis and noscitur a sociis were inapplicable because the "ordinary, natural meaning" of the statute plainly encompasses DWI.

In a short concurring opinion, Judge Lucero agreed that "a conviction for felony driving while under the influence falls within the ambit" of Section 924(e)(2)(B)(ii). Pet. App. A28. Indeed, Judge Lucero concluded (ibid.) that "the language of the statute is so clear and unambiguous that it does not allow resort to the legislative history." Thus, while Judge Lucero believed (ibid.) that DWI "may not have been in the minds of the 1986 amendment's sponsors when they drafted [Section 924(e)(2)(B)(ii)'s]

residual language," he concluded that the language's plain meaning extends to DWI, such that "if any change is to be made, it is for Congress, not the courts, to make."

c. Judge McConnell dissented in relevant part. Pet. App. A29-A46. In Judge McConnell's view (id. at A33-A34), the ACCA's "otherwise" clause is "susceptible to two linguistically plausible interpretations": the majority's "all crimes" interpretation or petitioner's "similar crimes" interpretation. Faced with this purported ambiguity, Judge McConnell believed that the "similar crimes" interpretation was the better one, given (inter alia) that (1) the enumerated crimes of burglary, arson, extortion, and offenses involving the use of explosives are "potentially more dangerous when firearms are involved," whereas "drunk driving is not of this nature" because it is a "crime of negligence or recklessness * * * rather than violence or aggression," Pet. App. A34-A35; see id. at A43; (2) a House Report pertaining to Section 924(e)(2)(B)(ii) stated that the provision would "add * * * crimes against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses," Pet. App. A38 (quoting H.R. Rep. No. 99-849 (1986)); (3) the canons of ejusdem generis and noscitur a sociis support the "similar crimes" interpretation, id. at A44-A45; and (4) to the extent that the statute remains ambiguous after resort to the legislative history and the foregoing canons, the rule of lenity counsels in favor of

the narrower, "similar crimes" interpretation, id. at A45-A46.

4. The court of appeals denied petitioner's petition for rehearing or rehearing en banc, with no judge in regular active service calling for a vote on the petition. Pet. App. B1.

ARGUMENT

Petitioner contends (Pet. 5-16) that his felony DWI convictions do not qualify as "violent felonies" under the ACCA. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. As an initial matter, review should be denied because the court of appeals remanded the case to the district court for resentencing. The court of appeals unanimously held that the district court had erred in concluding that it could only impose a sentence below the minimum Guidelines range (188 months of imprisonment) if it determined that the minimum range was unreasonable. The court of appeals made clear that on remand, the district court could impose a non-Guidelines sentence if the sentencing factors set forth in 18 U.S.C. 3553(a) warrant it, even if a Guidelines sentence would also be reasonable. Pet. App. A24, A27. The interlocutory posture of the case alone supports denial of the petition for a writ of certiorari. See, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); Virginia Military Inst. v. United States, 508 U.S. 946

(1993) (Scalia, J., concurring).

2. A "crime punishable by imprisonment for a term exceeding one year" qualifies as a "violent felony" under the ACCA if the offense meets certain criteria set out in the statute or "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). This Court has held that the ACCA generally requires a "categorical approach" to determining whether or not an offense constitutes a "violent felony." Taylor v. United States, 495 U.S. 575, 600 (1990). Under that approach, sentencing courts must "look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying th[e] convictions." Ibid.[5]

3. Petitioner does not dispute that the court of appeals followed the Taylor approach. Nor does he dispute that felony DWI, as defined by N.M. Stat. Ann. § 66-8-102, "presents a serious potential risk of physical injury to another." Instead, he contends (Pet. 6, 10-15) that the ACCA's "otherwise" clause must be construed to embrace only offenses similar to those encompassed by the words that precede it in Section 924(e)(2)(B)(ii), and that felony DWI is not sufficiently similar to those enumerated offenses

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[5] A sentencing court may look beyond the fact of conviction when the statute under which the defendant was convicted embraces conduct that categorically constitutes a violent felony as well as conduct that does not. See Taylor, 495 U.S. at 602; Shepard v. United States, 544 U.S. 13 (2005). That modified categorical approach is not at issue here.

(i.e., burglary, arson, extortion, and explosives offenses) because it does not present the same "confrontational risk" that they do. That contention is without merit.

a. In James v. United States, 127 S. Ct. 1586 (2007), this Court addressed the question "whether attempted burglary, as defined by Florida law, is a 'violent felony' under ACCA." Id. at 1590. The Court answered that question in the affirmative, concluding that attempted burglary -- though it is not burglary, arson, extortion, or an explosives offense -- "otherwise involves conduct that presents a serious potential risk of physical injury to another." Id. at 1591-1599. In so holding, the Court rejected James's reliance on the ejusdem generis canon for the proposition that, inasmuch as each of the enumerated offenses is a completed offense, the "otherwise" clause similarly encompasses only completed offenses. Id. at 1592-1593. In the Court's view, James's interpretation "would unduly narrow" the clause's "expansive phrasing," "which does not suggest any intent to exclude attempt offenses that otherwise meet the statutory criteria." Id. at 1592. The Court emphasized that "Congress' inclusion of [such] a broad residual provision * * * indicates that it did not intend the preceding enumerated offenses to be an exhaustive list of the types of crimes that might present a serious risk of injury to others and therefore merit status as a § 924(e) predicate offense." 127 S. Ct. at 1593 (emphasis added); see id. at 1597 ("As long as

an offense is of a type that, by its nature, presents a serious potential risk of injury to another, it satisfies the requirements of § 924(e)(2)(B)(ii)'s residual provision.").

b. The Court's approach to Section 924(e)(2)(B)(ii) in James undermines petitioner's contention that the provision excludes felony DWI simply because that offense does not present the same type of risk that the provision's enumerated offenses do. 127 S. Ct. at 1591-1599. Just as in James, petitioner's proposed limitation of the "otherwise" clause to offenses that present a "confrontational risk" (e.g., Pet. 6) "would unduly narrow" the clause's "expansive phrasing," "which does not suggest any intent to exclude" non-confrontational offenses "that otherwise meet the statutory criteria." Id. at 1592; cf. Harrison v. PPG Indus., Inc., 446 U.S. 578, 588-589 (1980) (rejecting application of the ejusdem generis canon where the Court "discern[ed] no uncertainty in the meaning of" the statute at issue and where the statute's "expansive language offer[ed] no indication whatever that Congress intended the limiting construction * * * that the respondents * * * urge[d]").

Indeed, this Court emphasized in James that "the most relevant common attribute of the [ACCA's] enumerated offenses * * * is that all of [them] * * * create significant risks of bodily injury or confrontation that might result in bodily injury." Id. at 1592 (emphasis added). A "similar crimes" limitation to the "otherwise"

clause is inconsistent with this Court's recognition that the listed crimes themselves are dissimilar and that a risk of bodily injury is alone sufficient to explain the inclusion of certain crimes. As Judge Hartz explained (Pet. App. A19-A20), the crimes expressly enumerated in Section 924(e)(2)(B)(ii) are merely examples of offenses that "present[] a serious potential risk of physical injury to another." As the Eighth Circuit noted in concluding that felony DWI is a "violent felony" for purposes of the ACCA, Congress listed burglary, arson, extortion, and explosives offenses out of an abundance of caution to make clear that those examples meet the operative statutory criterion. United States v. McCall, 439 F.3d 967, 971 (8th Cir. 2006) (en banc) ("[t]he form of the addition [to the statute] made the 'otherwise involves' provision look like a catchall when in fact it was initially the operative provision," and therefore "it is wrong to infer that Congress intended to limit the 'otherwise involves' provision to offenses that are similar to the enumerated add-ons"); see Taylor, 495 U.S. at 589 (the addition of the enumerated offenses "seemingly was meant simply to make explicit the provision's implied coverage of crimes such as burglary").

4. The decision below is fully consistent with the foregoing principles and with the decisions of this Court and the other courts of appeals.

a. As mentioned, the Eighth Circuit has concluded that

felony DWI is a "violent felony" under the ACCA. McCall, 439 F.3d at 970-973. In so holding, the Eighth Circuit rejected the same "similar crimes" argument that petitioner raises in an effort to limit Section 924(e)(2)(B)(ii)'s "otherwise" clause. Id. at 970-971. The Seventh Circuit has likewise concluded that felony DWI falls within the "otherwise" clause. United States v. Sperberg, 432 F.3d 706, 708-709 (7th Cir. 2005). Additionally, every court of appeals to consider the question has agreed that DWI falls within the identically worded "otherwise" clause in Sentencing Guidelines § 4B1.2(a)(2). United States v. DeSantiago-Gonzales, 207 F.3d 261, 264 (5th Cir. 2000); United States v. Veach, 455 F.3d 628, 635-637 (6th Cir. 2006); United States v. Moore, 420 F.3d 1218, 1221 (10th Cir. 2005); United States v. McGill, 450 F.3d 1276, 1280 (11th Cir. 2006); see supra p. 5. As this Court observed in James (127 S. Ct. at 1596), Section 4B1.2(a)(2)'s "definition of 'crime of violence' closely tracks ACCA's definition of 'violent felony,'" in that both terms identically include burglary, arson, extortion, explosives offenses, and offenses that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." Accordingly, the court of appeals correctly concluded (Pet. App. A12) that the "all crimes" interpretation endorsed in the foregoing Guidelines cases "is also correct for the ACCA."

b. Although Judge McConnell suggested in dissent (Pet. App.

A31-A32) that Leocal v. Ashcroft 543 U.S. 1 (2004), supports petitioner's "similar crimes" interpretation of the ACCA, the majority's "all crimes" interpretation is entirely consistent with Leocal. In Leocal, this Court held that a DUI offense is not a "crime of violence" under 18 U.S.C. 16. But Section 16 differs in important respects from Section 924(e). Under Section 16, a "crime of violence" includes "any other offense that * * * involves a substantial risk that physical force against the person or property of another may be used." 18 U.S.C. 16(b) (emphases added). In Leocal, the Court focused on the requirement that "physical force" be "used against" a person, 543 U.S. at 9, and it concluded that Section 16 demands a higher degree of mens rea than "the merely accidental or negligent conduct involved in a DUI offense." 543 U.S. at 11. In contrast, the ACCA's "violent felony" definition is not limited to offenses involving a substantial risk that "physical force" will be "used." Instead, it reaches all felonies involving "conduct that presents a serious potential risk of physical injury." 18 U.S.C. 924(e)(2)(B)(ii); see James, 127 S. Ct. at 1597 ("As long as an offense is of a type that, by its nature, presents a serious potential risk of injury to another, it satisfies the requirements of § 924(e)(2)(B)(ii)'s residual provision."). For that reason, Leocal expressly distinguished Sentencing Guidelines § 4B1.2(a)(2) -- which, as noted, parallels the ACCA -- by emphasizing that Section 16 "plainly does not encompass all

offenses which create a 'substantial risk' that injury will result from a person's conduct." 543 U.S. at 10 n.7.

c. Relatedly, petitioner errs in suggesting (Pet. 12-13) a conflict with United States v. Doe, 960 F.2d 221 (1st Cir. 1992) (Breyer, J.). Doe held that a conviction for being a felon in possession of a firearm is not a "violent felony" under Section 924(e). 960 F.2d at 224-226. As the court explained, "simple possession of a firearm does not fit easily within the literal language of the statute," because it is difficult "to imagine such a risk of physical harm often accompanying the conduct that normally constitutes firearm possession." Id. at 224-225. Although the court did suggest that "[t]here is no reason to believe that Congress meant to enhance sentences based on, say, proof of drunken driving convictions," id. at 225, that statement was dicta, and there is no conflict between Doe's holding and the decision below.

5. Finally, this Court in Gwartney v. United States, 127 S. Ct. 2097 (2007), denied review of another Tenth Circuit decision involving the same question presented here. There is no reason for a different result in this case. To the extent that petitioner seeks this Court's intervention based on the "strong dissents" in McCall and the decision below, review at this juncture would be particularly imprudent because James was decided after those dissents were written. Given James's further guidance about the

scope of Section 924(e)(2)(B)(ii), the dissenting judges to whom the petition refers might well refine or reconsider their analyses. In any event, those dissents do not represent the law in any circuit, and they do not warrant this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2007

BEST AVAILABLE COPY

NO. 06-11543

IN THE SUPREME COURT OF THE UNITED STATES

LARRY BEGAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF TO UNITED STATES' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 15(6), petitioner Larry Begay submits the following reply brief in response to the government's brief in opposition to his petition for a writ of certiorari.

ARGUMENT FOR ALLOWANCE OF THE WRIT

This case presents an important question of federal law that has not been, but should be, settled by this Court: is felony driving while intoxicated a "violent felony" for purposes of the Armed Career Criminal Act.

A. *Introduction*

The government fails to supply convincing reasons for this Court to deny certiorari in this case. That the Tenth Circuit remanded the case to the district court on a ground different from the ground Mr. Begay raises in his petition does not argue against this court addressing the Armed Career Criminal Act ("ACCA") issue the Tenth Circuit squarely addressed and ruled upon against Mr. Begay. With respect to the merits of Mr. Begay's contention that driving while intoxicated ("DWI") is not a "violent felony" under the ACCA, the government disregards the substance of Mr. Begay's cogent argument and the problematic implications of its own interpretation of the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii). This court should grant certiorari in this case to continue its exploration of the meaning of that clause in a context very different from the context this Court considered in *James v. United States*, 127 S.Ct. 1586 (2007).

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B. ***That the Tenth Circuit remanded this case to the district court on a ground different from the ground Mr. Begay raises in his petition does not argue against granting certiorari.***

That the Tenth Circuit remanded this case to the district court on a ground different from the ground Mr. Begay raises in his petition for certiorari is not an obstacle to this Court's granting of certiorari, as the government claims, (United States' Brief in Opposition ("BIO") 8-9). The Tenth Circuit held that the district court must resentence Mr. Begay because the district court had misunderstood its discretion to sentence between the bottom of the guideline range of 188 months and the ACCA mandatory minimum of 180 months. (App. A at 23-27). The Tenth Circuit upheld the district court's determination that Mr. Begay s three felony DWIs were "violent felonies" under the ACCA and, consequently, that the ACCA mandatory minimum applied. (App. A at 5-22; App. A, Con.). Mr. Begay challenges the latter final decision in his certiorari petition. The remand the Tenth Circuit ordered has no bearing on the ACCA issue Mr. Begay raises here. That issue is squarely before this court. This court's ruling on that issue will have a profound impact on Mr. Begay's resentencing. That issue is ripe for review.

This court has jurisdiction to review non-final judgments. *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 350-351 (1976); 28 U.S.C. § 1254(1)(cases in the Court of Appeals may be reviewed by the Supreme Court by "writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree"). This court reviews such judgments very often, including where resolution of the issue raised "is fundamental to the further conduct of the case." *Larson*

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v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 685, n. 3 (1949); *Land v. Dollar*, 330 U.S. 733, 734 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). This court's ruling in Mr. Begay's favor would fundamentally change Mr. Begay's sentence. Instead of facing a guideline range of 188 months to 235 months, (App. A at 3), and a mandatory minimum of 15 years, 18 U.S.C. § 924(e), he would face a guideline range of 41 to 51 months, (Petition for Certiorari ("PFC") at 1), with no applicable mandatory minimum and a maximum sentence of ten years, 18 U.S.C. § 924(a)(2). Mr. Begay raises a question the determination of which is critical to his resentencing.

This Court also grants certiorari when the reasons for certiorari override any finality concerns. *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-409 (1915)(lower courts differed on fundamental question); *Forsyth v. City of Hammond*, 166 U.S. 506, 515 (1897) ("unfortunate possibilities of conflict and collision" arising from adverse lower court decisions). Indeed, this court has granted review in many cases, including sentencing cases, where a circuit court of appeals has disposed of an appeal by remanding for further proceedings. *See*, e.g., *Gall v. United States*, 127 S.Ct. 2933 (2007)(granting certiorari to review *United States v. Gall*, 446 F.3d 884, 889-890 (8th Cir. 2006)(reversing sentence and remanding for resentencing)); *Scott v. Harris*, 127 S.Ct. 1769, 1773-1774 (2007)(reviewing Eleventh Circuit's decision affirming denial of civil rights defendant's summary judgment and remanding for trial); *United States v. Booker*, 543 U.S. 220, 228 (2005)(reviewing Seventh Circuit's reversal of sentence and remand to sentence within unenhanced guideline range or to hold separate sentencing hearing before jury); *Estelle v. Gamble* 429 U.S. 97, 98 (1976)(over

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dissent, *id.* at 115 (Stevens, J., dissenting), reviewing Fifth Circuit's reversal and remand with instructions to reinstate civil rights complaint); 17 CHARLES ALAN WRIGHT, et al., FEDERAL PRACTICE AND PROCEDURE § 4036, n. 74 (2007)(listing cases).

In short, "[r]eview is granted or denied according to a wide range of concerns, some of which bear on the finality of the disposition below, and many of which do not." 17 WRIGHT § 4036 & nn. 74 & 75. In this case, where compelling reasons support the granting of certiorari, the fact that the Tenth Circuit remanded for resentencing on grounds that have no effect on the issue which Mr. Begay raises and which the Tenth Circuit squarely addressed should not stand in the way of granting certiorari.

C. *This Court's decision in James does not conflict with Mr. Begay's position.*

To counter Mr. Begay's position, the government misapplies parts of this Court's discussion in *James*. Contrary to the government's claim, (BIO at 10-12), this Court's rejection of the *ejusdem generis* argument in *James* has no bearing on Mr. Begay's *ejusdem generis* argument in this case. This Court held in *James* that the "otherwise" clause is not limited to completed offenses, as the defendant claimed all the listed offenses were, but also includes attempts. *Id.*, 127 S.Ct. at 1592-1593. This Court first pointed out the enumerated offenses included offenses that were not completed, thus undermining the defendant's underlying premise. *Id.* at 1592. This Court then pointed out that the most relevant common attribute is not the completed nature of the listed offenses, but rather that all of those offenses "create significant risks of bodily injury or confrontation that might result in bodily injury."

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Id. In so stating, this Court made no inference, as the government asserts, (BIO at 11-12), that a relevant common attribute was not, as Mr. Begay contends, active violence.

This Court went on to explain that Congress "did not intend the ... enumerated offenses to be an exhaustive list of the types of crimes that might present a serious risk of injury to others ...." *Id.* at 1593. Again, this statement does not carry the import the government wishes it to, (BIO at 10-11. The notion that the enumerated offenses are not an exhaustive list is completely consistent with Mr. Begay's position. If it were an exhaustive list, there would be no need for a residual clause. This Court's reference to "types" of crimes refers to the question before this Court at the time—the completed nature of the offenses—, rather than to any other aspect of the enumerated offenses not before this Court.

The government's attempt to interpret that reference more broadly to support its notion that the enumerated offenses are merely examples of offenses that "present[] a serious potential risk of physical injury to another," (BIO 11, 12), is thwarted by this Court's subsequent discussion in *James*. This Court used the enumerated offenses as a "baseline" from which to measure whether the "otherwise" clause covered attempted burglary , as defined in Florida. *Id.* at 1594. Thus, this Court recognized the listed offenses play a more significant role than the government accords to them. The enumerated offenses illuminate the meaning of the residual clause. This Court in *James* certainly did not say, as the government contends it did, (BIO at 10-12), that any felony that "presents a serious risk of physical injury to another" is a "violent felony," whether or not it is an active, violent felony.

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As Justice Scalia pointed out in his dissent in *James*, *id.* at 1601, this Court failed to address, or provide a methodology to address, how the residual clause applies to offenses, such as DWI, that are not closely analogous to the enumerated offenses. This case presents an opportunity for this Court to undertake that task. Since *James* did not affect the issue Mr. Begay presents in this case, no further percolation of the issue in the lower courts in light of *James* is necessary, contrary to the government's position, (BIO 15-16). This court should grant certiorari now to address the question whether DWI is a "violent felony" under the ACCA.

D. *Leocal and Doe strongly support Mr. Begay's position.*

The government misunderstands the reasons why *Leocal v. Ashcroft*, 543 U.S. 1 (2004), and *United States v. Doe*, 960 F.3d 221 (1st Cir. 1992), support Mr. Begay's position. Of course, as the government points out, (BIO at 13-16), the holdings in *Leocal* and *Doe* are not in direct conflict with the Tenth Circuit's holding in this case. But, the analysis in *Doe*, 960 F.2d at 225, and this Court's quotation of that analysis in *Leocal*, 543 U.S. at 11, strongly support the persuasive force of the word the residual clause defines—"violent felony." That word "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence" than drunk driving does. *Doe*, 960 F.2d at 225. The residual clause must be read in light of that term. *Id.*

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E. ***The government's interpretation of the residual clause contradicts the language, and legislative history of the residual clause and the purpose of the ACCA.***

The government disregards the problematic features of its interpretation of the "otherwise" clause. Its notion that Congress enumerated burglary, arson, extortion and explosive offenses solely to make sure those offenses counted as predicate offenses, (BIO 12), reads the word "otherwise" completely out of the residual clause. App. A, Dissent at 7; *United States v. McCall*, 439 F.3d 967, 978 (8th Cir. 2006)(en banc)(Lay, J., dissenting). "Otherwise" clearly refers the residual clause back to the enumerated offenses. App. A, Dissent at 7. The government does not attempt to explain what purpose the word serves. Under its interpretation, "otherwise" serves no purpose. That result contravenes the well-established principle that every word of a statute should have a meaning if at all possible. *See Leocal*, 543 U.S. at 12.

The government's position also contradicts the legislative history of the ACCA and of the residual clause in particular. The government has no answer to the relevant House Report's reference to the residual clause as including crimes "similar" to the enumerated offenses. H. R. Rep. No. 99-849 , p. 3, quoted in *Taylor v. United States*, 495 U.S. 575, 587 (1990). Instead, the government cites to the *McCall* court's reliance on the fact the residual clause was initially the operative provision before the enumerated offenses were added. (BIO at 12 (quoting *McCall*, 439 F.3d at 971). But, as Judge McConnell explained, this history must be understood in a broader context.

> Congress was amending the 1984 version of the statute, which applied explicitly to robbery and burglary, and only to those crimes. These were not 'enumerated add-ons,' ... but were the statutory foundation on which the congressional deliberations

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> were based. The entire thrust of the 1986 debates was to expand the statute to encompass other crimes that warranted the same treatment already given robbery and burglary. The only question was how far to go.

(App., Dissent at 12). Congress chose to extend the definition of "violent felony" to include crimes "similar" to the enumerated offenses. H. R. Rep. No. 99-849, p. 3.

The government also fails to address the fact that its interpretation of the "otherwise" clause contradicts the purpose of the ACCA to "focus[] on career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Taylor*, 495 U.S. at 587-588. As Judge McConnell observed, (App. A, Dissent at 8-9),including drunk drivers as "armed career criminals" does not provide that "focus."

The government's position does not withstand scrutiny in light of the language and context of 18 U.S.C. § 924(e)(2)(B)(ii), cardinal principles of statutory construction, legislative history and the goals of the ACCA.

F. *The lack of a circuit conflict does not argue against granting certiorari.*

The lack of a circuit conflict on the question whether DWI is a "violent felony" under the ACCA, noted by the government, (BIO at12-13), does not impede the granting of certiorari in this case. First, the government exaggerates the extent of the agreement among the circuits by citing to the circuit courts' interpretation of "crime of violence" under USSG § 4B1.2(a)(2). (BIO at 13). All the judges of the Tenth Circuit agreed that interpretation does not govern the interpretation of "violent felony" under the ACCA, since the guideline commentary expands the

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coverage of the residual clause beyond the language of the ACCA's residual clause. (App. A at 11-12; App. A, Dissent at 3, n. 1). *See* USSG § 4B1.2, comment. (n.1).

Second, the issue Mr. Begay raises has provoked thoughtful dissents in *McCall* and this case. Third, the dissents have the better of the argument. Fourth, the government does not deny Mr. Begay's argument that he presents an important issue with dramatic consequences for many defendants. (PFC at 7-10). These reasons overcome any reluctance to decide an issue without a circuit conflict.

G. *More reasons exist for granting certiorari in this case than in Gwartney.*

Contrary to the government's argument, (BIO at 15-16), this Court's denial of certiorari in *Gwartney v. United States*, 127 S.Ct. 2097 (2007), in which the petitioner raised the same issue as Mr. Begay raises here, does not mean this Court should deny certiorari in this case. In *Gwartney*, before the Tenth Circuit, the defendant conceded the Tenth Circuit's prior decision that DWI was a "crime of violence" under § 4B1.2(a)(2) precluded his "violent felony" argument under the ACCA. *United States v. Gwartney*, 197 Fed.Appx. 746, 748 (10th Cir. Sept. 14, 2006)(unpub'd). As a consequence, the Tenth Circuit panel in that case reflexively denied relief without discussion in an unpublished decision. *Id.* By contrast, Mr. Begay vigorously challenged application of the ACCA. His advocacy provoked three thoughtful published opinions, including a dissent favoring Mr. Begay by Judge McConnell, "a well-respected federal judge," *see Rita v. United States*, 127 S.Ct. 2456, 2474 (2007)(Stevens, J., concurring). Because the arguments on both sides have been fully developed in this case, this case is more worthy than *Gwartney* of this Court's certiorari review.

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CONCLUSION

For the reasons stated above and in his petition for certiorari, petitioner Larry Begay requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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NO. 06-11543

IN THE SUPREME COURT OF THE UNITED STATES

LARRY BEGAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, Michael A. Keefe, Assistant Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this court and, as counsel for Larry Begay, I personally mailed copies of the motion for in forma pauperis and the petition for writ of certiorari by first class mail, postage prepaid to the Solicitor General, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, and to Assistant United States Attorney David N. Williams, P.O. Drawer 607, Albuquerque, NM 87103, this 15th day of August, 2007.

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IN THE

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LARRY BEGAY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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ARGUMENT

I. RECIDIVIST DRIVING WHILE INTOXICATED, AS DEFINED UNDER NEW MEXICO LAW, IS NOT A "VIOLENT FELONY" BECAUSE IT IS NOT A VIOLENT, ACTIVE PROPERTY CRIME TYPICAL OF CAREER CRIMINALS THAT BECOMES MORE DANGEROUS WHEN COMMITTED WITH A FIREARM.

The government's proffered "all crimes" interpretation of the "otherwise" clause extracts the word "otherwise" from the rest of the Armed Career Criminal Act ("ACCA") and exalts that word's dictionary definition above: the language and structure of 18 U.S.C. § 924(e)(2)(B)(ii) and the ACCA as a whole; the term the "otherwise" clause defines; the purpose of the ACCA; well-established canons of statutory construction; and the ACCA's legislative history. The government's position that the "otherwise" clause includes any crime of whatever kind "that presents a serious potential risk of physical injury to another" renders superfluous Congress's detailed delineation of what prior offenses trigger the drastic increase in punishment the ACCA mandates. This Court should reject that untenable position and adopt the interpretation that gives meaning to every word of the ACCA and fulfills Congress's objectives in designing the ACCA. The "otherwise" clause must be restricted to violent, active property crimes typical of career criminals that become more dangerous when committed with firearms.

A. The government's reading of the "otherwise" clause ignores its context and conflicts with this Court's precedent.

1. "[I]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006). Accordingly, statutory interpretation must begin with "the language of the governing statute, guided not by a single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy." *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 94-95 (1993) (internal quotations omitted).

The government takes the word "otherwise" entirely out of context, ascribes to it a dictionary meaning, declares that meaning to be plain, and effectively disregards every other aspect of the ACCA. Response Brief ("Resp. Br.") 25-34. But, whether statutory language is plain or ambiguous depends on the context. *Brown v. Gardner*, 513 U.S. 115, 118 (1994). "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used." *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 25 n. 6 (1988) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (Hand, J.)). An examination of the "otherwise" clause in light of the entire ACCA refutes the government's "all crimes" interpretation and strongly supports Larry Begay's "similar crimes" interpretation.

2. The term the "otherwise" clause defines—"violent felony"—limits the scope of that clause to

offenses that are violent and active. The government does not disagree with then-Judge Stephen Breyer's assessment in *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992), that the phrase "violent felony" "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence" than drunk driving. Resp. Br. 29 n. 17. Nonetheless, the government contends the "otherwise" clause "cover[s] a broader range of conduct than the term itself might otherwise 'call to mind.'" *Id.* (quoting *Doe*, 960 F.2d at 225). But, the "otherwise" clause must be read in light of the term it defines and harmonized with it, not ignored, as the government's contention does.

For example, in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court interpreted the residual clause of the definition of "crime of violence" under 18 U.S.C. § 16(b) in light of the meaning of the term "crime of violence." *Id.* at 11. "[W]e cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Id.* Similarly, in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), this Court rejected the government's argument in favor of broadening the definition of drug trafficking to include mere possession in part because its argument was "incoheren[t] with any commonsense conception of 'illicit trafficking,' the term ultimately being defined." *Id.* at 629-30.

The government's "all crimes" interpretation conflicts with any commonsense conception of "violent felony." In *Leocal*, this Court found the ordinary meaning of the term "crime of violence," combined with the emphasis of 18 U.S.C. § 16 on the use of physical force, "suggests a category of violent, active crimes that cannot be said naturally to include [driving under the influence] offenses." 543 U.S. at

11. By citing, in support of that conclusion, to then-Judge Breyer's observations in *Doe* regarding the term "violent felony," *id.*, this Court likened "crime of violence" to "violent felony." Thus, the term "violent felony" also "suggests a category of violent, active crimes that cannot be said naturally to include [driving under the influence] offenses." *Id.*

Mr. Begay is not attempting to read into the ACCA an intentional use-of-force requirement that the ACCA's text does not justify, as the government claims, Resp. Br. 29-30. Mr. Begay is appropriately interpreting the "otherwise" clause in light of its context, which includes the term that clause describes. This Court's distinction in *Leocal*, to which the government refers, *id.* at 30, between the "use of force" language in § 16(b) and the "serious potential risk of physical injury" language that defines "crime of violence" under USSG § 4B1.2(a)(2), *Leocal*, 543 U.S. at 10 n. 7, does not undermine that interpretative method. The "otherwise" clause of the ACCA—which, unlike the "serious potential risk" phrase in the Guidelines, Joint Appendix ("JA") 88-89, 106 n. 2; *see* USSG § 4B1.2, cmt. (n. 1), is linked by the word "otherwise" to the preceding enumerated violent, active offenses—must be read with the understanding that it defines a term that connotes a violent, active crime.

3. The purpose of § 924(e)(2)(B)(ii) manifests the congressional intent to confine the scope of the "otherwise" clause to offenses career criminals typically commit that are more dangerous when committed with firearms. The government proposes a purpose of § 924(e)(2)(B)(ii)—to deter those who "have demonstrated that they have little regard for the safety and well being of others"—that has no basis in the text. Resp. Br. 33-34. In *Taylor v.*

United States, 495 U.S. 575 (1990), this Court already explained the purpose of § 924(e)(2)(B)(ii) is to deter from possessing firearms "career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Id.* at 587-88.

The enactment of 18 U.S.C. § 924(c) does not contradict that conclusion, as the government asserts. Resp. Br. 33-34. Section 924(c) addresses the dangerousness of certain current offenses when committed with a gun. Section 924(e) addresses the dangerousness of certain possible future offenses when committed with a gun by those who committed those kinds of offenses in the past. The two provisions serve related, but different, purposes. The purpose of § 924(c) certainly does not interfere with, contradict, or render redundant the purpose this Court accorded to § 924(e) in *Taylor*.

As Judge McConnell observed, if the purpose of § 924(e) were as broad as the government claims, its enhanced penalty would not be limited as it is to those who unlawfully possess firearms. JA 118. The purpose of the ACCA, and in particular § 924(e)(2)(B)(ii), is, thus, precisely what this Court declared it is in *Taylor*—to deter from possessing firearms those who have committed offenses typically committed by career criminals that are more dangerous when committed with firearms. 495 U.S. at 587-88. The "otherwise" clause should be interpreted accordingly. *See id.* at 581, 587-88, 590 ("[t]hese observations about the purpose and general approach of the enhancement provision enable us to narrow the range of possible meanings of the term 'burglary'").

4. The two-part structure of § 924(e)(2)(B) strongly points to the inclusion of only property offenses in the "otherwise" clause of subsection (ii). With respect to that point, the government mistakenly assumes Mr. Begay is simply relying on the notion that the "otherwise" clause offenses must be similar to the enumerated offenses. Resp. Br. 31.

Mr. Begay's point is that § 924(e)(2)(B) is divided into one subsection that concerns crimes against people and another subsection that concerns crimes against property that could result in injury to a person. This Court's analysis of the legislative history in *Taylor* confirms this description. 495 U.S. at 584-85, 589, 597; *see also James v. United States*, 127 S. Ct. 1586, 1592 (2007) (referring to the enumerated crimes as "not technically against the person"). Subsection (i) describes offenses with elements related to "physical force against the person of another." Subsection (ii) specifically enumerates four offenses, all of which are property offenses, followed by the "otherwise" clause. This structure argues for restricting the "otherwise" clause solely to property offenses. *See United States v. McCall*, 439 F.3d 967, 979 (8th Cir. 2006) (en banc) (Lay, J., joined by Wollman and Bye, JJ., dissenting).

5. The title of the Armed Career Criminal Act further supports Mr. Begay's position that the "otherwise" clause includes only violent, active offenses typically committed by career criminals that become more dangerous when committed with firearms. Pet'r Br. 17-18. The government correctly states that the title of legislation is helpful as an interpretative aid only when doubt exists as to the meaning of a statute. Resp. Br. 31-32. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998). But, as demonstrated *supra* and *infra*, an

initial examination of the "otherwise" clause in context—an interpretative process that must be engaged in before determining the plain or ambiguous nature of a statutory phrase, *see Brown*, 513 U.S. at 118—supports Mr. Begay's position, not the government's.

6. The term "violent felony," and the title, purpose, and structure of the ACCA, inform the interpretation of the language of § 924(e)(2)(B)(ii)—"is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *See Dolan*, 546 U.S. at 486 (interpreting "a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute"). Contrary to the import of those relevant features of the ACCA, the government contends the word "otherwise" takes on a dictionary meaning, i.e., "in a different manner." Resp. Br. 25. There are at least four glaring flaws in that interpretation.

First, if "otherwise" means "in a different manner," the "otherwise" clause only applies when the risk is created in a manner different from how the risk is created when the enumerated crimes are committed. That reading would contradict *James*. In *James*, this Court held that the "otherwise" clause included attempted burglary because the commission of that offense creates the *same* kind of risk of physical injury as the enumerated offense of burglary does. 127 S. Ct. at 1594-96.

Second, interpreting the word "otherwise" to mean "in any way," as the government apparently does, Resp. Br. 26, renders the rest of the ACCA superfluous, violating the well-established principle that every word of a statute must be given meaning if at all possible. *See Leocal*, 543 U.S. at 12. According

"violent felony" status to every crime that creates a serious potential risk of physical injury would make unnecessary Congress's references to "serious drug offenses," § 924(e)(2)(A), and offenses that involve the use of physical force against a person. § 924(e)(2)(B)(i).

Indeed, the government's interpretation could sweep into the ACCA's realm offenses that other portions of the ACCA impliedly exclude. For example, it could include as a "violent felony" a drug offense that carries a maximum of less than ten years, even though § 924(e)(2)(A)(i) excludes that offense from the "serious drug offense" definition. As another example, the government's definition could include as a "violent felony" an offense against the person of another, such as involuntary manslaughter, that requires a lesser intentionality than the use of force required as an element under § 924(e)(2)(B)(i). Congress would hardly go to all the trouble of carefully delineating what predicate offenses trigger an ACCA enhancement and then eviscerate all its work with one phrase. *See United States v. Golden*, 466 F.3d 612, 617 (7th Cir. 2006) (Williams, J., dissenting) ("It seems unlikely . . . Congress would have gone to the trouble of delimiting the reach of section 924 to 'violent felonies' if it intended to subject [failure to return to jail] to enhanced punishment for recidivism."), *petition for cert. filed*, (U.S. Apr. 9, 2007) (No. 06-10751).

The government's interpretation also treats the enumerated offenses as meaningless. The word "otherwise" establishes a "substantive connection" between the clause that follows it and the enumerated offenses that precede it. JA 110 (McConnell, J., dissenting). The "all crimes" interpretation fails to tie the "otherwise" clause to the

enumerated offenses. Instead, it treats the "otherwise" clause as though Congress had set it out in a third subsection. The government contends Congress made the enumerated offenses a part of § 924(e)(2)(B)(ii) only to ensure those offenses were considered "violent felonies." Resp. Br. 38. But, that supposition fails to explain the word "otherwise." The word "or" alone, or enacting a third subsection, would serve the proffered purpose. JA 110-11 (McConnell, J., dissenting); *McCall*, 439 F.3d at 977 (Lay, J., joined by Wollman and Bye, JJ., dissenting).

In relying on cases interpreting the term "crime of violence" in the career offender sentencing guidelines, Resp. Br. 13 n. 5, the government again ignores the importance of the link in § 924(e)(2)(B)(ii) between the "otherwise" clause and the enumerated offenses. Those guidelines de-link the phrase "presented a serious potential risk of physical injury to another" from the enumerated offenses. USSG § 4B1.2, cmt. (n. 1). The Tenth Circuit panel unanimously agreed the de-linking was a significant feature distinguishing the career offender guidelines from § 924(e)(2)(B)(ii) that provided the basis for a broader interpretation. JA 88-89, 106 n. 2. The Sentencing Commission itself acknowledges the guideline definition of "crime of violence" is not the same as the ACCA's definition of "violent felony." USSG § 4B1.4, cmt. (n. 1). The government reads the "otherwise" clause as though it were disconnected from the enumerated offenses, as it is in the Guidelines, when, in fact, it is very closely connected.

Third, interpreting the word "otherwise" to mean "in any way" conflicts with the meaning of the term the "otherwise" clause defines—"violent felony"—the title and purpose of the ACCA, and the structure of § 924(e)(2)(B). The government takes one word in the

entire ACCA—"otherwise"—out of its context and uses it to override the import of that context. As noted above, statutory interpretation must be guided by the provisions of the whole statute and its object and policy. *John Hancock Mut. Life Ins. Co.*, 510 U.S. at 94-95.

Fourth, this Court has often interpreted the word "otherwise" to express similarity. In *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979), and *United States v. Mississippi*, 380 U.S. 128, 136-38 (1965), this Court interpreted the phrase "otherwise qualified" to mean that the individuals in question have the same valid qualifications as others. The government's spin on these cases that they interpret "otherwise" to mean "in other respects," Resp. Br. 25-26 n. 16, is at best incomplete. This Court at the very least interpreted "otherwise" to mean "in the *same* other respects."

In *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U.S. 290 (1902) this Court analogized the word "otherwise" in the phrase "by certiorari or otherwise" to the "*ejusdem generis*" principle. *Id.* at 295 ("The latter words ['or otherwise'] add nothing to our power, for if some other order or writ might be resorted to it would be *ejusdem generis* with certiorari."). Similarly, in *Board of Educ. v. Harris*, 444 U.S. 130 (1979), this Court applied the principles of *ejusdem generis* and construed the word "otherwise" to mean "in a similar manner" or "similarly." *Id.* at 138-150; *id.* at 153 (Stewart, J., dissenting); *see also Pollgreen v. Morris*, 911 F.2d 527, 532-33 (11th Cir. 1990) (word "otherwise" in the phrase "represented by counsel or otherwise" refers to representation that was "in a manner similar to that of counsel").

Likewise, here, the "otherwise" clause, read in context, includes only those offenses similar to

burglary, arson, extortion, and use of explosives in that they are violent, active property offenses typical of career criminals that are more dangerous when committed with firearms.

B. Canons of statutory construction establish the "otherwise" clause offenses must be similar to the enumerated offenses.

The doctrines of *noscitur a sociis* and *ejusdem generis* confirm Mr. Begay's argument that the "otherwise" clause includes only those offenses similar to the preceding enumerated offenses. The government erroneously asserts these doctrines have no place in the interpretative analysis because the "otherwise" clause identifies the "single relevant characteristic" the "otherwise" clause offenses and the enumerated offenses have in common—serious potential risk of physical injury. Resp. Br. 26-27. The object of the doctrines is to restrict the meaning of general words in light of the surrounding specific words, "to carry out the legislative intention," *Reiche v. Smythe*, 80 U.S. 162, 164 (1871), by "avoid[ing] giving unintended breadth to the Acts of Congress," *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). In this case, the doctrines restrict the meaning of "presents a serious potential risk of physical injury to another," in light of the enumerated offenses, to avoid giving the general phrase the unintended breadth the government seeks. Congress's listing of particular offenses before the broadly worded "otherwise" clause evinces an intent to limit the reach of that clause to offenses similar to the enumerated offenses in that they are violent, active property offenses typical of career criminals that are more dangerous when committed with firearms.

In support of its mistaken view of *noscitur a sociis* and *ejusdem generis*, the government misreads *James*. The government claims this Court in *James* held that imposing any limitations on the "otherwise" clause "would unduly narrow" the "expansive phrasing" of that clause. Resp. Br. 27 (quoting *James*, 127 S. Ct. at 1592). This Court did no such thing. This Court held only that the supposed completed nature of the enumerated offenses did not restrict the meaning of the "otherwise" clause. *James*, 127 S. Ct. at 1592-93. It did not hold the only attribute the "otherwise" clause and the enumerated offenses share is the significant risk of injury.

In *James*, this Court addressed whether the "otherwise" clause included attempted burglary, an offense that is an obvious analog to an enumerated offense. Attempted burglary shares all the attributes of the enumerated offenses that Mr. Begay contends the "otherwise" clause offenses also share. Attempted burglary is a violent, active property offense typical of career criminals that is more dangerous when committed with a firearm. This Court had no occasion to address whether the "otherwise" clause includes only offenses that fit that description.

The government does not deny that the enumerated offenses are violent, active property offenses. The government does assert the enumerated offenses of arson and use of explosives are not ordinarily committed as a means of livelihood. Resp. Br. 32-33. The government misses Mr. Begay's point. This Court indicated in *Taylor* that all the enumerated offenses, and the offenses the "otherwise" clause covers, are offenses that are typically committed by career criminals "as their means of livelihood." 495 U.S. at 587. While not everyone commits arson or

uses explosives to pursue a livelihood, the career criminals Congress targeted in § 924(e)(2)(B)(ii) typically commit those offenses. *Id.*

The government correctly observes that not all offenses included within § 924(e)(2)(B)(i)—the use-of-force subsection of § 924(e)(2)(B)—are typically committed as a means of livelihood. Resp. Br. 32. But, subsection (ii) of § 924(e)(2)(B), at issue here, is the provision Congress specifically directed at career offenders who commit property offenses as their means of livelihood, as this Court's discussion of the legislative history of subsection (ii) demonstrates. *Taylor*, 495 U.S. at 582-88. Thus, subsection (i) does not affect the career-criminal nature of subsection (ii).

The government also mistakenly claims that neither arson nor the use of explosives is more dangerous than any other offense when committed with a firearm. Resp. Br. 33. The government is wrong for the same reason this Court in *Taylor* explained that burglary is a dangerous offense. A burglary "creates the possibility of a violent confrontation between the offender," and a third party and the offender's "awareness of this possibility may mean he is prepared to use violence." 495 U.S. at 588. So also, in the ordinary case, an arsonist or user of explosives, by entering or going near the property he wishes to destroy, creates the possibility of a violent confrontation and is aware of the possibility that violence may be necessary. This makes arson and use of explosives more dangerous when committed with a firearm.

By contrast, a DWI offender does not court confrontation in that way and is not aware of the possibility of such a confrontation. In touting DWI's dangers, the government points only to the risks of

deaths and injuries caused by motor vehicle accidents, not to the risks of confrontation. Resp. Br. 16-20. Both Judges McConnell and Hartz recognized drunk driving is not more dangerous when firearms are involved. JA 94, 110. *See also McCall*, 439 F.3d at 983 (Lay, J., joined by Wollman and Bye, JJ., dissenting) (drunk driver's threat to society "is not intensified by gun possession").

The *ejusdem generis* and *noscitur a sociis* principles apply to the "otherwise" clause. They limit the scope of that clause to crimes that share several attributes with the enumerated offenses. Considering the entire context surrounding the clause, the "otherwise" clause includes only violent, active property offenses typical of career criminals that are more dangerous when committed with firearms.

C. The legislative history supports the "similar crimes" interpretation.

A review of the legislative history of § 924(e)(2)(B)(ii) strongly bolsters Mr. Begay's interpretation. The government's arguments to the contrary distort that history.

1. The government mistakenly relies on Congress's addition of the enumerated offenses to one proposed version of 924(e)(2)(B)(ii), which included only: "involves conduct that presents a serious potential risk of physical injury to another." Resp. Br. 37-38; *see Taylor*, 495 U.S. at 586 (quoting H. R. 4885). The government claims that sequence indicates Congress intended only to ensure the enumerated offenses were counted as "violent felonies." Resp. Br. 38. First, the sequence could easily warrant the opposite conclusion: Congress added the enumerated offenses to ensure a narrow reading of the provision. Congress members differed over how broad or narrow

the ACCA should be, and House Report No. 99-849 described the original clause as including the enumerated offenses and "similar" property crimes. *Taylor*, 495 U.S. at 583, 587 (quoting H. R. Rep. No. 99-849, at 3 (1986)).

Second, the enumerated crimes were not added to an already-enacted version of the ACCA. Resp. Br. 39. Congress was amending the 1984 version. That version explicitly applied only to robbery and burglary. *Taylor*, 495 U.S. at 581. The congressional discussions concerned how far to expand the ACCA enhancement to other offenses. Thus, as Judge McConnell pointed out, JA 114, enumerated offenses were the "statutory foundation on which the congressional deliberations were based."

Third, the government's explanation for adding the enumerated offenses—to ensure those offenses were covered, Resp. Br. 38—does not make sense in light of the simultaneous addition of the word "otherwise." A simple "or" alone would have served the government's proffered purpose. JA 110-11 (McConnell, J., dissenting); *McCall*, 439 F.3d at 977 (Lay, J., joined by Wollman and Bye, JJ., dissenting).

2. The legislative history, properly assessed, establishes Congress intended to limit the "otherwise" clause to property crimes similar to those enumerated. The government claims House Report No. 99-849 did not indicate Congress's belief that the "otherwise" clause would be so limited. Resp. Br. 39. The words of the report belie that claim.

The report observed that a major question involved in the hearings was "what violent felonies involving physical force against *property* should be included in the definition of 'violent' felony." *Taylor*, 495 U.S. at 587 (quoting H. R. Rep. No. 99-849, at 3) (emphasis in

original). Significantly, the report italicized the word "property." The report went on to state that the "serious potential risk" phrase "will add State and Federal crimes against *property* such as burglary, arson, extortion, use of explosives and *similar* crimes as predicate offenses." *Id.* (emphases added). The report's section-by-section analysis confirmed this analysis. *United States v. Parson*, 955 F.2d 858, 869 (3d Cir. 1992) (quoting H. R. Rep. No. 99-849, at 4-5). The report expresses congressional intent to restrict the "otherwise" clause to property offenses similar to the enumerated offenses.

D. The government misreads *James*.

The government overstates the holding in *James*. It declares this Court determined that a felony offense qualifies as a "violent felony" under the "otherwise" clause "[a]s long as [the] offense is of a type that, by its nature, presents a serious potential risk of injury to another." Resp. Br. 14 (quoting *James*, 127 S. Ct. at 1597). The government takes the quote out of context. The quoted phrase concluded this Court's explanation that, in making the risk determination under the "otherwise" clause, the proper inquiry concerns conduct in the ordinary case, rather than in its most innocuous form. *Id.* The quote upon which the government relies simply summarized this Court's ordinary-case holding. *Id.* This Court took no position on the limits on the kinds of unenumerated offenses the "otherwise" clause covers.

Similarly, the government misunderstands this Court's statement in *James* that Congress "did not intend the . . . enumerated offenses to be an exhaustive list of the types of crimes that might present a serious risk of injury to others . . . ." Resp. Br. 15 (quoting *James*, 127 S. Ct. at 1593). The

James Court's reference to "types" of crimes referred to the question before this Court at the time—the completed nature of the offenses—rather than to any other aspect of the enumerated offenses not before this Court.

The government's attempt to use that reference more broadly is thwarted by this Court's subsequent discussion in *James*. This Court compared the risk of physical injury associated with Florida attempted burglary to the same kind of risk associated with the enumerated offense of burglary to ascertain whether the "otherwise" clause covered the Florida offense. *James*, 127 S. Ct. at 1594-96. Thus, this Court recognized the listed offenses play a more significant role than the government accords to them. This Court certainly did not say that any felony of whatever type that "presents a serious risk of physical injury to another" is a "violent felony." Rather, this Court indicated the enumerated offenses illuminate the meaning of the residual clause.

E. Recidivist DWI, as defined under New Mexico law, is not a violent, active property crime typical of career criminals that becomes more dangerous when committed with a firearm.

The "otherwise" clause of § 924(e)(2)(B)(ii) does not encompass the traffic offense of DWI, as defined under New Mexico law. That offense is not a violent, active property offense typically committed by career criminals that is more dangerous when committed with a firearm. Since DWI does not fit any of the criteria for inclusion under the "otherwise" clause, it is not a "violent felony." Even assuming arguendo that this Court adopts only one of Mr. Begay's suggested "otherwise" clause criteria, Mr. Begay's DWI convictions do not qualify as convictions for

"violent felonies." Therefore, the ACCA does not apply to Mr. Begay.

II. RECIDIVIST DRIVING WHILE INTOXICATED, AS DEFINED UNDER NEW MEXICO LAW, IS NOT A "VIOLENT FELONY" BECAUSE IT HAS NO *MENS REA* ELEMENT.

The context of the "otherwise" clause, in particular the term the "otherwise" clause defines—"violent felony"—and the purpose of 18 U.S.C. § 924(e)(2)(B)(ii) to deter career criminals who prey on the community, strongly connote a focus on those who engage in deliberate conduct. The canons of *noscitur a sociis* and *ejusdem generis* establish there must be similarities between the "otherwise" clause offenses and the preceding enumerated offenses, each of which indisputably has a *mens rea* element. The harshness of the ACCA enhancement triggers the presumption of a *mens rea* requirement. For these reasons, the "otherwise" clause includes only offenses with *mens rea* elements, which New Mexico DWI does not have.

1. The government is wrong when it asserts, without citation to authority, that the presumption of a *mens rea* requirement is inapplicable to sentence enhancements. Resp. Br. 34-35. While the *mens rea* presumption is usually applied to statutes defining criminal offenses, there is "little doubt that it should also be applied to legal norms that define aggravating circumstances for purposes of sentencing." *United States v. Brown*, 449 F.3d 154, 157 (D.C. Cir.) (internal quotations omitted), *on reconsideration*, 463 F.3d 1 (2006).

> Like the rule of lenity—which [this Court] has stated on several occasions applies not only 'to

> interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose,' *Bifulco v. United States*, 447 U.S. 381, 387, (1980)—the presumption against strict liability is founded on the principle that laws that deprive an individual of his liberty should be strictly construed. Laws that enhance the sentence of a criminal defendant meet this description.

Id.

2. The government posits that the knowing nature of drinking alcohol plus the recklessness of driving drunk suffice to constitute *mens rea*. Resp. Br. 35. That argument contradicts New Mexico law, which makes DWI a strict-liability offense. *State v. Rios*, 980 P.2d 1068, 1070 (N.M. Ct. App. 1999). That the act of DWI might supply evidence of a state of mind does not create a scienter element. The categorical approach requires assessment solely of the elements of the offense in question. *See James*, 127 S. Ct. at 1597. New Mexico DWI contains no *mens rea* element, not even the intent to drive. *Rios*, 980 P.2d at 1070. The "otherwise" clause therefore does not include New Mexico DWI.

III. RECIDIVIST DRIVING WHILE INTOXICATED, AS DEFINED UNDER NEW MEXICO LAW, IS NOT A "VIOLENT FELONY" BECAUSE, BASED SOLELY ON ITS ELEMENTS, IT IS NOT "PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR."

The "otherwise" clause does not include recidivist DWI, as defined under New Mexico law, because the elements of that offense are not "punishable by imprisonment for a term exceeding one year" under

18 U.S.C. § 924(e)(2)(B). The definition of "violent felony" focuses on the offense, not on the offender. The government has failed to demonstrate to the contrary. The seriousness of the offense for ACCA purposes depends on the elements. The elements of New Mexico recidivist DWI call for a sentence of less than a year.[1] *State v. Anaya*, 933 P.2d 223, 228 (N.M. 1996); N.M. Stat. Ann. § 66-8-102(E).

This Court should consider this argument, although Mr. Begay did not raise it before the Tenth Circuit. This Court has jurisdiction to consider issues not presented below. *Carlson v. Green*, 446 U.S. 14, 17, n. 2 (1980). The government acknowledges Mr. Begay's certiorari question includes the issue under this point, and apparently does not oppose addressing that issue. Resp. Br. 44-45.

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[1] The government asserts the issue in *United States v. Rodriguez*, No. 06-1646, is "identical in substance" to the one Mr. Begay raises here. Resp. Br. 45. Two distinctions exist between Mr. Begay's case and Mr. Rodriguez's. First, on pages 16-17 of its *Rodriguez* brief, the government argues the phrase "a maximum" in § 924(e)(2)(A)(ii), rather than "the maximum," indicates the ACCA contemplates alternative statutory maximums. The relevant phrase applicable to this case is "any crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 924(e)(2)(B). That phrase does not lend itself to alternative maximums and highlights the focus of § 924(e)(2)(B) on the offense.

Second, in New Mexico, a DWI punishable as a felony, unlike all non-DWI felonies, cannot be used to increase a sentence under the state's habitual offender statute. *State v. Begay*, 17 P.3d 434, 435-437 (N.M. 2001). It would be problematic to impose on Mr. Begay the drastic enhancement the ACCA requires based on a conviction New Mexico does not deem serious enough to warrant an enhancement under its habitual offender law.

Because Mr. Begay's DWI convictions were not for crimes "punishable by imprisonment for a term exceeding one year," the ACCA does not apply to Mr. Begay.

IV. RECIDIVIST DRIVING WHILE INTOXICATED, AS DEFINED UNDER NEW MEXICO LAW, IS NOT A "VIOLENT FELONY" BECAUSE IT DOES NOT INVOLVE CONDUCT THAT PRESENTS A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY TO ANOTHER.

Assuming arguendo that the "otherwise" clause includes all crimes that present a serious potential risk of physical injury to another, the government has not met its burden to prove the clause encompasses recidivist DWI in New Mexico. The government improperly extends its analysis beyond the elements of DWI in New Mexico and focuses on the cumulative impact of DWI, while ignoring the critical question—the degree of risk associated with an individual DWI episode.

1. Assuming arguendo that the "all crimes" interpretation applies to the "otherwise" clause, the proper inquiry to determine whether that clause includes an offense "is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of [physical] injury to another." *James*, 127 S. Ct. at 1597. The entire focus is on the elements of the offense, not the specific conduct involved. *Id.* at 1594. The government disregards that precept throughout its attempt to show DWI meets the requisite risk standard.

The government points out that to be guilty of DWI in New Mexico the offender must be impaired. Resp.

Br. 21-22. Impairment, however, is insufficient to establish DWI creates a risk of injury. The government asserts the impairment "is generally proved by behavioral evidence, such as erratic driving, failed sobriety tests, and slurred speech." Resp. Br. 22. But, the failing of a sobriety test and slurred speech do not create any danger. Certainly, erratic driving could create such a danger, but neither such driving nor the violation of a traffic code is an element of a New Mexico DWI. Thus, this Court may not consider such circumstances in assessing the dangerousness of that offense. *James*, 127 S. Ct. at 1597. The "conduct encompassed by the elements of the offense," *id.* at 1597, does not present any danger.

The government dismisses the fact that DWI can be committed while parked on private property, *see State v. Johnson*, 15 P.3d 1233, 1235-38, 1240 (N.M. 2000), by contending DWI presents a danger in the ordinary case. Resp. Br. 23-24. First, it is far from clear the ordinary DWI is not parking and roadblock DWI, where no evidence exists of dangerous driving. *See Johnson*, 15 P.3d at 1235-38.; *State v. Sanchez*, 36 P.3d 446, 448, 450-51 (N.M. Ct. App. 2001). Second, and more importantly, any dangerous driving is not "conduct encompassed by the elements of" DWI. *See James*, 127 S. Ct. at 1597.

By contrast, when an offender commits attempted burglary in Florida, in the ordinary case, no further conduct on the offender's part is necessary to present the requisite risk of injury. *Id.* at 1594-96. In New Mexico, conduct satisfying the elements of DWI does not present the required risk, absent additional conduct. For that reason, among others, the government's statistics, Resp. Br. 17-18, are irrelevant. They measure, at best, the consequences

of conduct that goes beyond conduct encompassed by the elements of DWI in New Mexico.

2. The government proceeds on the incorrect assumption that the cumulative impact of DWI episodes matters. Resp. Br. 17-19. The serious-potential-risk question turns on the dangerousness of a single violation, not the consequences of all the violations throughout the country. When this Court assessed the risk of attempted burglary in *James*, it evaluated the risks involved with respect to a typical discrete case of attempted burglary, not the effect of all the attempted burglaries in the United States. 127 S. Ct. at 1594-96. The government's statistical argument is inapposite.

Also inapposite is the government's reliance on the purported increased danger recidivist DWI offenders create when they re-offend. Resp. Br. 17-18, 19 & n. 13. Under New Mexico law, a driver's recidivism is not an element of the offense. *Anaya*, 933 P.2d at 228-29. It is therefore irrelevant. *See James*, 127 S. Ct. at 1594, 1597.

Moreover, the statistics and authorities the government cites in order to show the extra-dangerousness of recidivists are of no value. First, the government grossly misstates the percentage of recidivists who were drivers with a blood alcohol concentration of .08 or more and involved in alcohol-related fatalities in 2006. According to the table to which the government cites, the actual percentage is seven, not eighty, as the government states. Resp. Br. 17; NHTSA, *Traffic Safety Facts* tbl 10 (Aug. 2007) *available at* http://www.nhtsa.dot.gov/portal/nhtsa_static_file_downloader.jsp?file=/staticfiles/DOT/NHTSA/NCSA/Content/RNotes/2007/810821.pdf (last visited Dec. 26, 2007). Second, even that figure overestimates the

risk "to another," since drunk drivers are more likely to kill themselves than someone else. National Association of Criminal Defense Lawyers Brief ("NACDL Br.") 11. Third, the government cites its own Department of Justice publication for the proposition that repeat offenders are disproportionately responsible for alcohol-related crashes, without explaining what that disproportion supposedly is or on what evidence the proposition is based. Resp. Br. 18 & n. 9 (citing Office of Community Oriented Policing Servs., U.S. Dep't of Justice, *Drunk Driving, Problem-Oriented Guides for Police, Problem-Specific Guides Series* No. 36 at 4 (Feb. 2006) *available at* http://www.cops.usdoj.gov/mime/open.pdf?Item=1665 (last visited Dec. 26, 2007)). Fourth, the government claims a recidivist is far more likely to drive with high blood alcohol content, and is therefore far more likely to cause a fatal accident. But, that claim does not appear in the publication the government cites. *Id.*

On the other hand, amicus NACDL submitted an affidavit from Dr. Paul Zador that reliably assesses the risk of physical injury to another associated with a single drunk driving episode—the relevant issue. Based on an evaluation of accepted sources, while erring on the side of overestimation, Dr. Zador's study indicated one in every 386 DWI episodes, and one in every 3395 episodes of driving within two hours of drinking, resulted in an injury to someone other than the impaired driver. NACDL Br. 9 & attach. 18-19. Thus, there is a very low probability a particular impaired-driving episode would result in physical injury to another.

3. The government mistakenly relies on the Sentencing Commission's inaction with respect to the inclusion of DWI as a "crime of violence" under the

career offender guidelines. Resp. Br. 20-21. The Commission only exercises its authority, as noted in *Braxton v. United States*, 500 U.S. 344, 348 (1991), to revise the Guidelines in response to circuit court decisions when necessary to resolve circuit splits. 65 Fed. Reg. 50034-03, 50037 (Aug. 16, 2000). As the government observes, the circuit courts were not split on whether DWI was a "crime of violence." Resp. Br. 20. Notably, the Commission has not explicitly listed DWI as a crime that presents a serious potential risk of injury, despite the long list of "crimes of violence" the Commission has specified in addition to those enumerated in the guideline itself. USSG § 4B1.2(a)(2) & cmt. (n. 1). The government points to no evidence the Commission has conducted any empirical analysis of DWI risks. The Commission's silence says nothing on that subject. *See Brown*, 513 U.S. at 121 (congressional silence "lacks persuasive significance") (quotations omitted).

4. The government has not met its burden to prove New Mexico DWI presents a serious potential risk of physical injury to another under the "otherwise" clause.

V. THE CONSTITUTIONAL AVOIDANCE DOCTRINE AND THE RULE OF LENITY PROHIBIT INCLUSION OF RECIDIVIST DWI, AS DEFINED UNDER NEW MEXICO LAW, IN THE ACCA'S "OTHERWISE" CLAUSE.

The constitutional avoidance doctrine and the rule of lenity require resolving the interpretation of the "otherwise" clause in Mr. Begay's favor. The government's arguments to the contrary are unpersuasive.

A. The constitutional avoidance doctrine prohibits inclusion of recidivist DWI, as defined under New Mexico law, in the ACCA's "otherwise" clause.

1. The government misunderstands the vagueness problem to be avoided in this case. The problem is not that it is merely harder to apply the "all crimes" interpretation with respect to crimes that are not analogous to the enumerated crimes, Resp. Br. 40-41, but rather that that interpretation fosters confusion and requires guesswork. On the other hand, the "similar crimes" interpretation provides clear guidance because it is grounded in a comparison to the enumerated offenses. Without that connection to the enumerated offenses, the "all crimes" interpretation fails to give fair warning and invites arbitrary enforcement, rendering it unconstitutionally vague. *See* National Association of Federal Defenders Brief ("NAFD Br.") 9-12, 25-26.

2. The government contests Mr. Begay's separation-of-powers point by noting statutory and judicial standards that require risk determinations. Resp. Br. 41-43. But, unlike the serious-potential-risk determination the "all crimes" interpretation necessitates, those risk determinations are made in the context of an adversarial proceeding in light of specific facts presented with respect to particular incidents. Under the "all crimes" interpretation, a court must assess risks on a categorical basis without any evidence, requiring, in practice, resort to hypotheticals and speculation. The court then decides as a policy matter whether the degree of risk is serious enough to warrant the drastic ACCA enhancement. That process calls for "an essentially legislative judgment." *United States v. Thomas*, 159

F.3d 296, 299-300 (7th Cir. 1998); *see also* NAFD Br. 19-24, 27.

3. The government offers no response to Mr. Begay's Fifth and Sixth Amendment arguments, other than to say that the serious-potential-risk question under the "all crimes" interpretation is a legal question. Resp. Br. 43. While the "all crimes" approach does not require an investigation into the particular circumstances of a defendant's prior convictions, as the government notes, Resp. Br. 43, it does require an inquiry into the facts of an entire category of offenses. A court must discern what level of risk of what physical injuries is associated with the commission of an offense in the ordinary case. That type of fact finding goes well beyond "the conclusive significance of a prior judicial record" and is thus subject to due process and Sixth Amendment requirements. *See Shepard v. United States*, 544 U.S. 13, 25 (2005) (plurality opinion); *see also* NAFD Br. 13-19, 26-27.

B. The rule of lenity prohibits inclusion of recidivist DWI, as defined under New Mexico law, in the ACCA's "otherwise" clause.

This Court has made clear the rule of lenity applies to penalty provisions. *Bifulco v. United States*, 447 U.S. 381, 387 (1980). Without citation to any authority, and there appears to be none, the government claims rule-of-lenity concerns are less compelling when applied to a sentencing provision that does not regulate primary conduct. Resp. Br. 44. The government makes an invalid distinction. The purposes the rule of lenity serves—fair notice, separation of powers, and uniformity of interpretation—are not any less significant in the context of a predicate-conviction, sentencing statute.

The rule of lenity applies with full force to the ACCA. This Court must resolve any doubt in Mr. Begay's favor. *See Leocal*, 543 U.S. at 11-12 & n. 8.

If necessary, application of the constitutional avoidance doctrine and the rule of lenity precludes inclusion of New Mexico recidivist DWI in the "otherwise" clause. The ACCA does not apply to Mr. Begay.

CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the Tenth Circuit's judgment affirming application of the ACCA to Mr. Begay.

Respectfully submitted,

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No. 06-11543

SUPREME COURT, U.S.
FILED
NOV 5 - 2007
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IN THE

Supreme Court of the United States

LARRY BEGAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

04-CR-00245 WJ

UNITED STATES OF AMERICA,
Plaintiff,

v.

LARRY BEGAY,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
		* * * *
11/09/2004	9	**INDICTMENT** by USA David M. Walsh. Counts filed against Larry Begay (1) count(s) 1 (mk) (Entered: 11/12/2004)
		* * * *
01/24/2005	22	**PLEA AGREEMENT** as Larry Begay (jrm) (Entered: 01/24/2005)
01/24/2005	23	**CLERK'S MINUTES**: before Magistrate Judge Robert H. Scott. Larry Begay enters guilty plea to indictment; sentencing to be set; deft in custody C/R; Danna Everett; Interpreter; Esther Yazzie* (dmw) (Entered: 01/25/05)
		* * * *

DATE	NO.	PROCEEDINGS
04/13/2005	26	**AMENDED OBJECTIONS** by plaintiff to presentence report/sentencing memorandum* (dmw) (Entered: 04/13/2005)
05/09/2005	27	**SENTENCING MEMORANDUM** by Larry Begay* (dmw) (Entered: (05/10/2005)
05/16/2005	28	**CLERK'S MINUTES**: before District Judge William P. Johnson sentencing continued as to Larry Begay C/R: T Garrett (dmw) (Entered: 05/17/2005)
07/01/2005	29	**MEMORANDUM OPINION AND ORDER** by District Judge William P. Johnson on the issue of whether deft should be sentenced as an armed career criminal, as further described herein (cc: all counsel*) SENT TO WESTLAW & LEXIS FOR PUBLICATION ON 7/19/05 (dmw) Modified on 7/01/2005 (Entered: 07/01/2005)
		* * * *
07/15/2005	31	**MOTION FOR RECONSIDERATION OF MEMORANDUM OPINION & ORDER** re career criminal by Larry Begay* (dmw) (Entered: 07/15/2005)
07/18/2005	32	**RESPONSE TO MOTION FOR RECONSIDERATION OF MEMORANDUM AND ORDER** re career by plaintiff [31 - 1]* (dmw) (Entered: 07/19/2005)

DATE	NO.	PROCEEDINGS
07/19/2005	33	**ORDER DENYING MOTION FOR RECONSIDERATION OF MEMORANDUM OPINION AND ORDER** re career criminal by Judge William P. Johnson [31 - 1]* (dmw) (Entered: 07/19/2005)
07/20/2005	34	**CLERK'S MINUTES**: before District Judge William P. Johnson sentencing Larry Begay (1) count(s) 1. SENTENCE IMPOSED: CBOP: 188 Months; 3 years supervised release w/special conditions; SPA $ 100.00; deft in custody, case terminated C/R: T Garrett (dmw) (Entered: 07/22/2005)
07/29/2005	35	**JUDGMENT** by District Judge William P. Johnson for Defendant Larry Begay (distribution as required*) (dmw) (Entered: 07/29/2005)
08/05/2005	36	**NOTICE OF APPEAL** to Circuit Court by Larry Begay [35 - 1]; Fees not required - Distribution as required. (pg) (Entered: 08/05/2005)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

05-2253

UNITED STATES OF AMERICA,
Plaintiff,

v.

LARRY BEGAY,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
12/27/2005	[1883018]	**APPELLANT'S BRIEF** filed by Larry Begay. Original and 7 copies. c/s: y. Served on 12/21/05. Oral Argument? y. Appellee's brief due 1/23/06 for United States.
		* * * *
01/26/2006	[1886514]	**APPELLEE'S ANSWER BRIEF** filed by United States filed per court order of 2/6/06. original and 7 copies. c/s: y. Served on 1/24/06. Oral Argument? y. Appellant's optional reply brief due 2/10/06 for Larry Begay.
		* * * *
02/13/2006	[1888681]	**APPELLANT'S REPLY BRIEF** filed by Larry Begay. Original and copies. c/s: y.
		* * * *

DATE	NO.	PROCEEDINGS
07/27/2006	[1940588]	**CASE ARGUED** by Margaret A. Katze for appellant and by David N. Williams for appellee; Submitted to Judges Lucero, Hartz, McConnell.
12/12/2006	[1983928]	**TERMINATED ON THE MERITS** after Oral Hearing; Affirmed; Written, Signed, Published. Lucero, concurring; Hartz, authoring judge; McConnell. [05-2253] Parties served by mail on 12/12/06.
		* * * *
01/09/2007	[1990445]	**PETITION FOR REHEARING EN BANC** [05-2253] filed by Larry Begay. Original and 18 copies. c/s: y.
		* * * *
02/07/2007	[1999295]	**RESPONSE TO APPELLANT'S PETITION FOR REHEARING EN BANC** filed by United States; submitted to court. original and 14 copies. c/s: y.
02/21/2007	[2003439]	**ORDER DENYING PETITION FOR REHEARING** [1990445 - 1] filed by Judges Lucero, Hartz and McConnell. Judge McConnell dissents from denial. No one called for a poll; therefore, the en banc petition is also denied.

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed NOV 9, 2004]

Criminal No. 04-2245 WJ

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LARRY BEGAY,
Defendant.

---

18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2):

Felon in Possession of a Firearm

INDICTMENT

The Grand Jury charges:

On or about the 25th day of September, 2004, in McKinley County, State and District of New Mexico, the defendant, LARRY BEGAY, a person who had been convicted of crimes punishable by imprisonment for a term exceeding one year, Driving While Under the Influence of Intoxicating Liquor and/or Drugs, a fourth degree felony, in the Eleventh Judicial District Court in Cause No. CR-2001-275, Aggravated Driving While Under the Influence of Intoxicating Liquor and/or Drugs, a fourth degree felony, in the Seventh Judicial District Court in Cause No. 0725-CR-2000-00139, Driving While Under the Influence of Intoxicating Liquor and/or Drugs in the Eleventh Judicial District Court, a fourth degree felony, in Cause No. CR-98-000079, did unlawfully and knowingly possess

a firearm, namely, a Martin model Glenfield .75C, .22 caliber rifle, serial number 23381287.

In violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2).

SENTENCING ALLEGATIONS

1. In relation to the Defendant's possession of the firearm as charged in the Indictment, the Defendant possessed a firearm in connection with committing the felony offenses of Assault with a dangerous weapon, within the meaning of U.S.S.G. § 2K2.1(b)(5).

2. In relation to the Defendant's prior felony convictions as charged in the Indictment, the Defendant possessed a firearm after sustaining a felony conviction for a crime of violence within the meaning of U.S.S.G. § 2K2.1(a)(4)(A) and a violent felony within the meaning of 18 U.S.C. § 924(e)(2)(B).

/s/ [Illegible]

/s/ Paula Burnett
United States Attorney

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed JUN 24, 2005]

Criminal No. 04-2245 WJ

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LARRY BEGAY,
Defendant.

PLEA AGREEMENT

Pursuant to Rule 11, Fed. R. Crim. P., the parties hereby notify the Court of the following agreement between the United States Attorney for the District of New Mexico, the defendant, **LARRY BEGAY**, and the defendant's counsel, Margaret Katze, Esq.

REPRESENTATION BY COUNSEL

1. The defendant understands his right to be represented by an attorney and is so represented. The defendant has thoroughly reviewed all aspects of this ease wit] his attorney and is fully satisfied with that attorney's legal representation.

RIGHTS OF THE DEFENDANT

2. The defendant further understands his rights:

   a. to plead not guilty;

   b. to have a trial by jury;

   c. to confront and cross-examine witnesses and to call witnesses in his defense; and

d. against compelled self-incrimination.

WAIVER OF RIGHTS AND PLEA OF GUILTY

3. The defendant hereby agrees to waive these rights and to plead guilty to the one count indictment charging a violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2) that being Felon in Possession of a Firearm.

SENTENCING

4. The defendant understands that the maximum penalty the Court can impose is:

a. imprisonment for a period of not more than ten (10) years; however, the defendant may be an armed career criminal which carries a minimum mandatory sentence of fifteen (15) years imprisonment.

b. a fine not to exceed the greater of $250,000,

c. a term of supervised release of not less than two (2) years nor more than three (3) years that must follow any term of imprisonment. (If the defendant serves a term of imprisonment, is then released on supervised release, and violates the conditions of supervised release, the defendant's supervised release could be revoked—even on the last day of the term—and the defendant could then be returned to another period of incarceration and a new term of supervised release.); and

d. a mandatory special penalty assessment of $100.00.

5. Sentencing is pursuant to the advisory United States Sentencing Guidelines and the applicable statutes. The defendant has reviewed the application

of the guidelines with Margaret Katze, his attorney, but understands that no one can predict with certainty what guideline range will be applicable in this case or what the sentence will be with respect to the applicable statutory maximum or statutory minimum, until after a presentence investigation has been completed and the Court has ruled on the results of that investigation. The defendant will riot be allowed to withdraw his guilty plea if the sentence is higher than the defendant expected. **The defendant fully understands that no one can predict with certainty what sentence the Court will impose. The determination of the actual sentence imposed is solely in the reasonable discretion of the Court.**

6. It is expressly understood and agreed by and between the defendant and the United States that:

a. The United States has made, and will make, NO AGREEMENT pursuant to Rule 11 (e)(1)(C), Fed. R. Grim. P., that a specific sentence is the appropriate disposition of this case.

b. The United States has made, and will make, NO AGREEMENT to approve, to oppose, or not to oppose pursuant to Rule 11(e)(1)(8), Fed. R Crim. P. any request made by the defendant or on behalf of the defendant for a particular sentence in this case.

c. The United States hereby expressly reserves the right to make known to the United States Probation Office, for inclusion in the presentence report prepared pursuant to Rule 32(c)(2), Fed, R. Crim. P., any information that the United States believes may be helpful to the Court.

STIPULATIONS

7. The United States and the defendant stipulate as follows:

Pursuant to U.S.S.G § 3E1.1, the defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct, Consequently, the defendants ultimate sentence should reflect a full acceptance of responsibility. This recommendation is contingent upon the defendant providing an appropriate oral or written statement to the United States Probation officer who prepares the presentence report in this case in which the defendant clearly establishes his entitlement to this reduction.

8. The United States and the defendant understand that the above stipulation is not binding on the Court and that whether the Court accepts this stipulation is e matter solely within the discretion of the Court after it has reviewed the presentence report.

FORFEITURE

9. The defendant agrees that he will forfeit to the United States all of his right, title, and interest in the following assets and properties:

a. a Marlin, model Glenfield .75C, .22 caliber rifle, serial number 23381287;

GOVERNMENT'S AGREEMENT

10. Provided that the defendant fulfills his obligations as set out above, the United States agrees that:

a. The United States will not bring additional charges against the defendant arising out of the

defendant's conduct now known to the United States Attorney's Office for the District of New Mexico.

b. At sentencing, the United States will recommend the bottom end of the advisory guideline imprisonment range.

11. This agreement is limited to the United States Attorney's Office for the District of New Mexico and does not bind any other federal, state, or local agencies or prosecuting authorities.

VOLUNTARY PLEA

12. The defendant agrees and represents that this plea of guilty is freely and voluntarily made and not the result of force or threats or of promises apart from those set forth in this plea agreement There have been no representations or promises from anyone as to what sentence the Court will impose.

VIOLATION OF PLEA AGREEMENT

13. The defendant understands and agrees that if he violates any provision of this plea agreement, the United States may declare this plea agreement null and void, and the defendant will thereafter be subject to prosecution for any criminal violation including, but not limited to, any crime(s) or offense(s) contained in or related to the indictment filed in this case, as well as perjury, false statement, and obstruction of justice.

ENTIRETY OF AGREEMENT

14. This document is a complete statement of the agreement in this case and may not be altered unless done so in writing and signed by all parties.

AGREED TO AND SIGNED this 24th day of January, 2005.

/s/
David M. Walsh
Assistant United States Attorney
201 Third Street N.W., Suite 900
Post Office Box 607
Albuquerque, New Mexico 87102
(505) 346-7274

I have read this agreement and carefully reviewed every part of it with my attorney. I understand the agreement and voluntarily sign it.

/s/
LARRY BEGAY
Defendant

/s/
MARGARET KATZE
Attorney for Defendant

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed APR 13, 2005]

Criminal No. 04-2245 WJ

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LARRY BEGAY,
Defendant.

AMENDED UNITED STATES' OBJECTIONS TO PRESENTENCE REPORT/SENTENCING MEMORANDUM

COMES NOW Plaintiff, the United States of America, by and through its attorneys, David C. Iglesias, United States Attorney, and David M. Walsh, Assistant United States Attorney for said district, and does hereby submit its objections to the Presentence Report as follows:

FACTUAL BACKGROUND

On November 9, 2004, an indictment was filed charging the defendant with Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2). The charge arose out of an incident that occurred on or about September 25, 2004. On that date, the defendant, after a night of drinking Jim Beam whiskey and Bull Ice beer, pointed a .22 rifle at his family members, Annie and Helen Begay.

First, the defendant demanded money from Helen and threatened to shoot her and repeatedly pressed the trigger of the empty firearm. Next, the defendant went inside Annie's room and pointed the rifle at her and demanded that she give him money. Presentence Report, ¶¶ 10-11.

Annie Begay called the authorities the next day. Eventually, a firearm was retrieved from the defendant's bedroom, and the defendant was interviewed about the incident. In a post-Miranda statement, the defendant admitted to Special Agent Oscar Ramirez of the FBI that he owned a .22 caliber rifle and knew that he was not to be in possession of a firearm. The defendant, however, was reticent about his threatening conduct towards Annie and Helen Begay. An investigation into the defendant's criminal history revealed that the defendant had three (3) felony DUI convictions prior to September 25, 2004.

I. OBJECTIONS TO PRESENTENCE REPORT

A. *The Defendant should be Sentenced as an Armed Career Criminal Under 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4.*

The United States objects to the total offense level as stated in the Presentence Report and contends that the. Defendant is an armed career criminal due to his three (3) felony DUI convictions. The defendant therefore must be sentenced to a statutory minimum of fifteen (15) years imprisonment. Several definitions of "crime of violence" appear in the Sentencing Guidelines and related statutes, and those definitions apply in different situations. For example, in the recent immigration-related case of *Leocal v. Ashcroft*, --U.S--, 125 S.Ct. 377 (2004), the U.S. Supreme Court held that a DUI offense did not meet the definition of

crime of violence under 18 U.S.C. § 16. This case does not affect the instant one given that a different statutory definition was at issue in *Leocal*[1]. In fact, the *Leocal* opinion takes note of the distinction between 18 U.S.C. § 16 and the broader career-offender definition in the sentencing guidelines. Whereas the definition under 18 U.S.C. § 16 relates to the use of force, the Court recognized that the career-offender definition includes "conduct that presents a serious potential risk of physical injury to another." *Leocal v. Ashcroft*, --U.S.—, 125 S.Ct. at 388, fn. 7. Although the career offender "crime of violence" definition of § 4B1.2 of the guidelines differs somewhat from the Armed Career Criminal definition under 924(e), both definitions include the "otherwise" clause: "or otherwise involves conduct that presents a serious potential risk of physical injury to another." *See* 18 U.S.C. § 924(e)(2)(B); U.S.S.G. § 4B1.2(a)(2).[2]

The U.S. Supreme Court has not addressed whether a felony DUI conviction is a predicate offense under 924(e) or § 4B1.2. However, other courts have addressed the issue, rendering different results. The

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[1] *See United States v. McGill*, 347 F. Supp. 1210, 1214 (M.D. Alabama 2004), discussed *infra*, noting that the *Leocal* Court distinguished the guideline definition of § 4B1.2 from that of 18 U.S.C. § 16.

[2] In the § 2K2.1 guideline section for firearms cases, if a defendant has a prior conviction for a crime of violence, the base offense level is 20 if there's one such conviction and 24 if there are at least two such convictions. The definition for a crime of violence for the purposes of § 2K2.1 is governed by the definition under § 4B1.2. Here, if the Defendant has a crime of violence under § 2K2.1/§ 4B1.2, then the Defendant will also be an aimed career criminal since his DUI offenses would fall under "conduct that presents a serious potential risk of physical injury to another."

Eight Circuit has ruled that a DUI offense is not a violent crime under the career offender provision, nor under 924(e). *United States v. Walker*, 393 F.3d 819 (8th Cir. 2005); *United States v. McCall*, 397 F.3d 1028 (8th Cir. 2005). On the other hand, the Fifth Circuit has determined that DUI does count under § 4B1.2. *United States v. DeSantiago-Gonzales*, 207 F.3d 261 (5th Cir. 2000).[3] Additionally, in the case of *McGill*, 347 F. Supp. at 1210 (M.D. Alabama 2004), an Alabama district court has recently ruled that a DUI offense could constitute a crime of violence under § 4B1.2 of the guidelines.

Likewise, in *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995), the Seventh Circuit found that a DUI offense causing bodily injury was a crime of violence under § 4B1.2. The *Rutherford* holding is directly on point for other "plain" DUI offenses that do not involve injury, because the *Rutherford* court found that the DUI offense was not a crime of violence based on the use of force, but rather because it met the definition of the "otherwise" clause under § 4B1.2. In making its ruling, the Seventh Circuit noted that it was misguided, under the "otherwise" clause, to focus on the actual effect of the conduct. In other words, to determine "serious potential risk of physical injury," the court reasoned that it was of no import whether someone actually was injured or not, since injury can occur from conduct that presents a minimal risk. *Rutherford*, 54 F.3d at 376. Instead, the *Rutherford* court observed that the focus must be placed on the conduct involved in the offense.

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[3] *DeSantiago-Gonzales* was an immigration case, but the § 4B1.2 definition of "crime of violence" was applied. The court determined that the misdemeanor DUI offenses were crimes of violence because of the serious potential risk of physical injury.

Rutherford, 54 F.3d at 375-376 ("Driving Under the Influence vastly increases the probability that the driver will injure someone in an accident.").[4] *See also McGill*, 347 F. Supp. at 1215 ("the cases make clear that it is the *nature* of the act of drunk driving itself, rather than any potential *result* that renders felony DUI a "crime of violence" under the Sentencing Guidelines.")(emphasis in original).[5]

The Tenth Circuit has not directly stated that felony DUI is a crime of violence within the meaning of § 4B1.2 or 924(e), but it has suggested as much. In *United States v. Farnsworth*, 92 F.3d 1001, 1008-09 (10th Cir. 1996), the Tenth Circuit held that the crime of grossly negligent driving under the influence of drugs or alcohol is a crime of violence under § 4B 1.2, finding that the conduct presented a serious potential risk of physical injury. *Farnsworth*, 92 F.3d at 1008-09. In so holding, the Tenth Circuit stated that:

> [w]e agree with the Seventh Circuit that: the dangers of drunk driving are well documented.

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[4] That Felony DUI poses a serious potential risk of injury is an obvious proposition to many New Mexicans.

[5] To compare DUI with other offenses that have been construed as violent crimes under the "otherwise" clause of the Armed Career Criminal Act, *see e.g.*, *United States v. Martin*, 378 F.3d 578 (6th Cir. 2004) (eluding a police officer presented serious potential risk of injury); *United States v. Howtze*, 343 F.3d 919 (7th Cir. 2003) (flights to avoid arrest and street thefts were crimes of violence under the ACCA); *United States v. James*, 337 F.3d 387 (4th Cir. 2003) (failing to stop for a "blue light" was a violent felony under 924(e)); *United v. Sacko*, 103 F. Supp.2d 85, 90 (D.R.I. 2000)(third degree sexual assault was a "violent felony," with the court noting that a serious potential risk exists if the likelihood of injury is more than trifling or insignificant).

> Unlike other acts that may present some risk of physical injury, . . . the risk of injury from drunk driving is neither conjectural nor speculative. . . . Drunk driving is a reckless act that often results in injury, and the risks of driving while intoxicated are well known. This is sufficient to satisfy the "serious risk" standard of the "otherwise" clause [of § 4B1.2(1)(ii)].

Farnsworth, 92 F.3d at 1009 (brackets in original) (citing *Rutherford*).

Based on the reasoning in *Rutherford* and *Farnsworth* and a fair reading of the statute, the United States contends that felony DUI is a violent felony under 18 U.S.C. § 924(e)(2)(B)(ii) since the conduct of a felony DUI "involves conduct that presents a serious potential risk of physical injury to another." Felony DUI offenses squarely fit within the "otherwise" clause of both § 4B1.2 and 924(e). Arguably, any one-time act of driving drunk presents a serious risk of physical injury to another. But, it is the repeated act of driving drunk, as in the case of someone who has been convicted of felony DUI, that certainly fits the bill of presenting a serious potential risk of physical injury to another.

B. *The Defendant's Conduct with the Firearm Warrants an Enhancement*

An armed career criminal's base offense level under § 4B1.4 of the guidelines is either a 33 or 34. In this case, the base offense level should be a 34, since the Defendant committed an aggravated assault with a deadly weapon when he pointed his .22 rifle at Annie and Helen Begay. Accordingly, the Defendant's guideline range should be 188-235 months. In the event the Court does not sentence the Defendant as

an armed career criminal, a 4-level enhancement. under § 2K2.1(b)(5) should apply for the Defendant's possession of a firearm in connection with another felony offense.

Respectfully submitted,

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[Certificate of Service omitted in printing]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed MAY 9, 2005]

Criminal No. 04-22245 WJ

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LARRY BEGAY,
Defendant.

DEFENDANT'S SENTENCING MEMORANDUM

Larry Begay, by and through his attorney, Margaret Katze, Assistant Federal Public Defender files the following sentencing memorandum.

1. The government asserts that Mr. Begay has 3 felony DUI convictions and should therefore be sentenced as an Armed Career Criminal to 15 years in prison. They reach this conclusion based on the faulty believe that a DUI is a "crime of violence". A DUI conviction is not a crime of violence and does not qualify as a predicate felony for purposes of 18 U.S.C. §924(e).

2. 18 U.S.C. §924(e)(2)(B) defines a "crime of violence" as any crime punishable by imprisonment for a term exceeding one year that has as an element the use, attempted use or threatened use of physical force against the person of another; or is burglary, arson or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential

risk of physical injury to another. The government has not proven that Mr. Begay has three convictions for any such offense nor that the crimes were punishable by imprisonment of more than one year. A reading of New Mexico Statutes Annotated §66-8-102 shows that the statutory definition of driving while under the influence does not include an element of force nor does it show that the crime itself is statutorily punishable by a term of imprisonment exceeding one year.

3. There is no Tenth Circuit law that has establishes DUI as a crime of violence for purposes of determining Armed Career Criminal status. Courts that have ruled on this issue, in this context and others, have found that a DUI is not a crime of violence. In *U.S. v. Brian Hartley*, (04-350MV, U.S. District Court, District of New Mexico), Judge Warren W. Eginton refused to find that a DWI was a crime of violence in a similar situation where the government was urging the court to enhance the defendant's sentence by finding that a DWI conviction was a conviction for a crime of violence. (Court found that DWI conviction was not a crime of violence for purposes of determining offense level pursuant to U.S.S.G. §2K2.1(a).)

4. The government dismisses *United States v. McCall*, 397 F.3d 1028 (8th Cir. 2005) in a string cite, when in fact it is the case most on point. In that case decided recently, the court concluded that a felony DWI is not a violent felony under the Armed Career Criminal Act (ACCA). The McCall court followed *U.S. v. Walker*, 393 F.3d 819 (8th Cir. 2005) which also decided that a felony DWI was not a violent felony under the (ACCA). Further the opinion refers to the, then, Chief Judge Breyer's opinion in *U.S. v. Doe*,

"There is no reason to believe that Congress meant to enhance sentences based on, say, proof of drunken driving convictions. Rather, we must read the definition in light of the term to be defined, 'violent felony', which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." *U.S. v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (cited with approval in *Leocal v. Ashcroft* 125 S.Ct. 377, 383 (2004)).

5. The court in *Walker* discusses statutory construction and legislative history relative to this inquiry. "The otherwise clause of §4B1.2(2) follows an enumeration of specific crimes: burglary of a dwelling, arson, extortion, and crimes that involve the use of explosives. Where general words follow specific words in a statutory enumeration, the established interpretive canons of *noscitur a sociis* and *ejusdem generis* provide that the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. This conclusion is reinforced by the legislative history of the statute from which the guideline is derived. DWI is not similar to the crimes listed in §4B1.2(a)(2), therefore under the rule of *ejusdem generis*, DWI is not encompassed by the general language the follows." *U.S. v. McCall*, 397 F.3d 1028, 1031 (8th Cir. 2005) (internal citations omitted).

6. The Supreme Court recently ruled in *Leocal v. Ashcroft*, 125 S.Ct. 377 (2004), that DUI is not a crime of violence. The court found that state DUI offenses, (like the New Mexico statute), that do not require proof of any particular mental state, or that require only a showing of negligence in driving a car do not constitute crimes of violence under 18 U.S.C. §16. Subsection(a) of §16, which defines a crime of

violence as an offense that has as an element the use. . .of physical force against the person or property of another, suggests a higher degree of intent than negligence or merely accidental conduct. Subsection (b) of § 16 which further defines a crime of violence as any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense, relates to the risk that physical force may be required to commit the crime, e.g., burglary. "The ordinary meaning of this term, [crime of violence], combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI." *Id.* at 383. The elements of 18 U.S.C. §924(e) and 18 U.S.C. §16 are very similar and upon analysis of the two sections the same conclusion is reached—DUI is not a crime of violence.

7. The cases the government cite in support of it's proposition are inapposite. In *U.S. v. Farnsworth*, 92 F.3d 1001 (10th Cir. 1996) the prior conviction in question was a vehicular manslaughter. There the defendant was convicted of killing a human being. Likewise, in *U.S. v. Rutherford*, 54 F.3d 370 (7th Cir. 1995), the prior conviction in question was assault. There the defendant caused serious bodily injury to another person.

* * * *

Wherefore, for the foregoing reasons this Court should find that any prior DUI conviction is not a crime of violence and that Mr. Begay should not be sentenced as an Armed Career Criminal.

Respectfully submitted,

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Electronically filed
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IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed MAY 16, 2005]

Criminal No 04-2245 WJ

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LARRY BEGAY,
Defendant.

TRANSCRIPT OF SENTENCING

* * * *

[5] MR. WALSH: Your Honor, if I may approach, I would like to tender to the Court Government Exhibits 1, 2, and 3, which are the defendant's felony convictions:

THE COURT: Any objection?

MS. KATZE: No, Your Honor.

THE COURT: All right. They will be admitted. (Government's Exhibits 1, 2, and 3 admitted into evidence.)

MR. WALSH: Your Honor, Government's Exhibits 1, 2, and 3 are three felony DUI convictions of the defendant, and [6] again, we are relying upon those convictions to support our argument that the defendant is an armed career criminal under 18 U.S.C. 924(e). Just to touch upon the arguments laid out in the government's Sentencing Memorandum, it's the

Supreme Court; United States Supreme Court has not addressed the issue as to whether felony DUI counts for the purposes of 924(e) as far as it being a predicate offense.

THE COURT: What about the—you mentioned the *Leocal* case.

MR. WALSH: Yes, Your Honor.

THE COURT: Now, what exactly were the facts in *Leocal*? What did the Supreme Court address?

MR. WALSH: Your Honor, the key issue with respect to *Leocal*, as it applies here, is that, one, that I argue that it does not apply because the Supreme Court was interpreting a completely different statute and a statute whose definition, in terms of crime of violence, reads differently than the statute of 18 U.S.C. 924(e)

As a matter of fact, Footnote 7 of that particular case recognizes that—or that points out in the case that the court noted that they were not dealing with the 18 U.S.C. 924(e) statute and that the statute that was being reviewed under *Leocal* did not have the particular clause which we say applies here. That has come to be known as the quote-unquote otherwise clause.

[7] And I read from that the otherwise clause indicates under U.S.C. 924(e), which also, Your Honor, is the same definition under Section 4B1.2 of the sentencing guidelines, that applies to the career offender provision. The otherwise clause states, "or otherwise involves conduct that presents a serious potential risk of physical injury to another."

So again, I refer the Court to Footnote 7 in *Leocal*, which kind of clarifies that the court was not ad-

dressing 924(e) and was dealing with a different statute in terms of what was a crime of violence or what wasn't. And I think Footnote 7 indicates that the Supreme Court was pointing out that it was not making a call or a decision as to whether a felony DUI counts for purposes of 924(e) or 4B1.2 of the sentencing guidelines.

So I think that *Leocal* actually perhaps suggests that the Supreme Court is open-minded about the felony DUI being a crime of violence under the armed career criminal statute because of this otherwise clause that wasn't present in the statute that was being reviewed in *Leocal*.

As to the other cases that have addressed this issue, the Eighth Circuit has said no, and I point this out to the Court in—let's see. The Eighth Circuit, in *United States versus Walker* and *United States versus McCall*, has stated that—has ruled that felony DUI does not count. They have determined that it does not count for the purposes of 924(e).

[8] And as to the authority that has deemed a felony DUI as being a predicate offense under 924(e), I would refer to Court to *United States versus DeSantiago-Gonzales* and also the case of *United States versus McGill*, which is a district court case out of Alabama, a 2004 case.

And *DeSantiago-Gonzales*, it was a little convoluted because they were dealing with an immigration case, but they weren't dealing with the immigration statute that was reviewed under *Leocal*. They were being guided by 4B1.2, that definition under the career offender provision which contains that otherwise clause. And the United States—the Alabama case of *McGill* was dealing with 4Bl.2 of the guidelines, which again, is the same definition as 924(e).

The Tenth Circuit has not specifically addressed whether a felony DUI does not count for purposes of 924(e); however, it has suggested that it could count or perhaps that it should count. And in my brief, Your Honor, I referred to the case of *United States versus Farnsworth.*

Now, they were dealing with a different offense. They weren't dealing with strictly felony DUI. They were dealing with a grossly negligent driving offense that I believe resulted in injury. But what's important with respect to *Farnsworth* is that they interpreted 924(e) or they felt like the appropriate analysis was to look at the nature of the conduct at issue as opposed to the actual result.

[9] And they cite a case which I cite to in my brief, to *United States versus Rutherford,* a Seventh Circuit case. And in that case, they found that DUI, an offense causing bodily injury, was a crime of violence under Section 4B1.2. And in order for the *Rutherford* case to get where they eventually arrived; they go through an analysis where they really pinpoint the conduct and they say that the cases make clear that it is the nature of the act of drunk driving itself rather than any potential result that renders felony DUI a crime of violence under the sentencing guidelines.

THE COURT: The *Rutherford* case, though, from what jurisdiction did that emanate from?

MR. WALSH: The Seventh, Your Honor.

THE COURT: Was it a Seventh—

MR. WALSH: A Seventh Circuit case.

THE COURT: Is it a distinction between the Eighth Circuit opinion where they said it does not—

the felony DWI does not, and then the Seventh—is the difference in that there was DWI, but in one instance, you had serious bodily injury, and the other you didn't?

MR. WALSH: I believe that the Eighth Circuit, they went about their analysis differently than the analysis that was conducted in *Rutherford*. I think to my memory, the Eighth Circuit in that case, they did not look at that otherwise clause and they did not look at the nature of the offense to [10] determine whether it involved a potential serious injury or risk to another.

They, I believer reached their conclusion by essentially saying, well, DUI is not what you think of when you think of a violent offense. And I think that their—they got it wrong because they got away from interpreting the statute itself under 18 U.S.C. 924(e); again, that being the otherwise Clause.

And again, *Rutherford* goes on to say that driving under the influence vastly increases the probability that the driver will injure someone in an accident, and again, the main focus of the *Rutherford* case was the conduct and not the overall result or the outcome. And again, the Tenth Circuit, in *United States versus Farnsworth*, followed the analysis that was laid out in *Rutherford*.

The Tenth Circuit said that, "We agree with the Seventh Circuit that the dangers of drunk driving are well documented unlike other acts that may present risk of physical injury. The risk of injury for drunk driving is neither conjectural nor speculative. Drunk driving is a reckless act that often results in injury, and the risks of driving while intoxicated are well known. This is sufficient to satisfy the, quote, serious

risk standard of the, quote, otherwise clause of 4B1.2."

And again; the Tenth Circuit case of *Farnsworth* was [11] dealing with an offense that was—that resulted in injury grossly negligent driving under the influence of drugs or alcohol and not really felony DUI; however, what's important, I contend, is that the analysis that they undertook was that laid out in *Rutherford*, which focused on the nature of the conduct as opposed to the actual outcome.

So that, that's kind of the authority that's out there in a nutshell, Your Honor. We think that felony DUI counts for the purposes of 924(e) because it fits within the plain meaning of the statute. I think that's some—a proposition that New Mexican state residents would not have any problem with, that felony DUI has a serious potential risk of injury to another.

For those reasons, we contend that the defendant is an armed career criminal under 924(e) and, therefore, has to face 15 years of mandatory confinement.

THE COURT: Ms. Katze, in her memorandum, referenced, I guess, a decision that visiting Judge Warren Eginton made on this same issue, and he, I guess, would I be correct he followed the Eighth Circuit's analysis? Are you familiar with that?

MR. WALSH: I—

THE COURT: I know it was published. It may have been an oral pronouncement from the bench. I'm not sure.

MR. WALSH: Yes, Your Honor, I don't know if the [12] Judge Eginton, whether Judge Eginton followed the Eighth Circuit or whatever, but that is certainly my understanding, that he determined that felony

DUI was not a crime of violence under 924(e). That case was going to get appealed, and for a while, it was—the appeal was in the works. But I think for *Booker*-related reasons, it's my understanding that that appeal was dropped. So there was no such issue that's before the Tenth Circuit at the moment.

THE COURT: Okay.

MR. WALSH: Nothing further, Your Honor.

* * * *

[13] MS. KATZE: Your Honor, I believe that the government's reasoning set forth in their brief and their argument is basically overruled by *Leocal*. Even though the statute that they predominantly address is different, the government can only point to a footnote to urge the Court that *Leocal* doesn't apply.

And I would ask the Court to consider the following paragraph that I think is exactly on point and addresses the reasoning that we need to deal with here, the underlying question: Is DWI a crime of violence? And this is just shortly after Footnote 7, and it says, "In construing both parts of Section 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with Section 16's [14] emphasis on the use of physical force against another person or the risk of having to use such force in committing a crime, Suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses."

They go on and cite with approval the opinion of the then Chief Judge Breyer: "Observing that the term 'violent felony' in U.S.C. 924(e)"—which is what we're dealing with—"calls to mind a tradition of

crimes that involve the possibility of more closely related, active violence. Interpreting Section 16 to encompass accidental or negligent conduct would blur the distinction between the violent crimes Congress sought to distinguish for heightened punishment and other crimes."

And I think their analysis is exactly on point, and I believe that is the controlling law, the Supreme Court case and the analysis that we have. The cases that the government cited all occurred pre-*Leocal*, and the only case that they discuss that occurred post-*Leocal* was the Eighth Circuit case of *McCall* that followed the reasoning and then applied it specifically and only to the 924(e) situation. I think that's exactly what's on point for what we are arguing here.

And just as an—I think that resolves the issue, but as a side issue, but I don't believe that the government, if we're going to look at this from a categorical approach, the government hasn't proven that the statute of conviction, the [15] New Mexico statute making DWI a crime, that it has as a specific element the use of force the potential use of force the substantial risk of injury or any other definition that's included in 924(e).

They have not shown that, if we take the categorical approach under *Taylor* and subsequently under *Shepard*, that it meets that, nor have they proven also that, under the definition of what is a crime of violence, a crime which has as a sentence one year or more in prison. They haven't come forward and proven that.

And I think that those—I add those issues for the record, but I believe that it is—the issue itself is resolved by *Leocal* and certainly by *McCall*. And I

think Probation's analysis of the situation—and it appears to be the same as ours, looking at *McCall* and the language that they cite. And I think this is important as far as how do we evaluate or analyze the statute.

And there is—in *McCall*, they discuss some legislative history and statutory construction as well in *Leocal*. In *Leocal*, they look, at the Florida statute for DWI, which doesn't appear to be any different in that—again, they reach the conclusion. "Section 16 cannot be read to include a conviction for DUI causing serious bodily injury under Florida law. This construction is reenforce by Congress' use of the term 'crime of violence.'"

[16] And they go on and discuss the Immigration and Naturalization Act. But I would also point the Court to the language in the Eighth Circuit decision, *McCall*; again, the only case that we're discussing that has analyzed the situation post-*Leocal*, with the indication from the Supreme Court how they. analyze this situation: "There is no reason to believe that Congress meant to enhance a sentence based on, say, proof of drunk driving. Rather, we must read the definition in light of the term to be defined—'violent felony'—which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence."

The court also stated that the clause in 4B1.2 follows an enumeration of specific crimes, and again, these are crimes, again, that we think of in the tradition of act of violence: Burglary of a dwelling, arson, use of explosives.

And then, "Where general words follow specific words in a statutory enumeration the established

interpretive canons noscitur a sociis and ejusdem generis"—and I apologize if my Latin wasn't correct.

THE COURT: I don't think it's any better than mine.

MS. KATZE: "Provide that the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words"; and, "DWI is simply not similar to the crimes listed."

It's not encompassed in the general language, and it [17] doesn't fall—and Mr. Walsh discussed the otherwise clause. That's exactly what their analysis addresses, that it doesn't fall within the otherwise clause. By its nature, it's a different type of crime.

Your Honor, that's with respect to the issue of whether or not Mr. Begay is—should be considered an armed career criminal and receive a 180-month sentence versus Probation's analysis and evaluation of the—under the sentencing guideline's that he should receive 41 months. The issue of whether or not a DWI should be considered a crime of violence for that purpose, that's my argument on that.

THE COURT: Mr. Walsh, since it was the government's objection, do you wish to make anything—say anything in reply to defense counsel's argument?

MR. WALSH: Real briefly, Your Honor. Just again, just to go back to our argument, we're arguing that felony DUI fits under the otherwise clause of 924(e) and that, again, the otherwise clause is not part and was not part of the statute that the *Leocal* case dealt with. And again, that particular footnote makes that distinction, saying that—

THE COURT: Let me ask you this. Ms. Katze made one point that the New Mexico statute under which, I guess, Exhibits 1, 2, and 3 are based on, which would be the New Mexico felony statute.

MR. WALSH: Yes, Your Honor, 66-8-102.

[18] THE COURT: Right. She makes a point that none of the elements in that New Mexico statute would constitute a crime of violence; so therefore, as I understand the argument, if the statutes that you're relying—if the offenses under state law that you're relying on to trigger the 924(e) enhancement the underlying state law offenses would not constitute crimes of violence, then how could, you know, nine—

MR. WALSH: Well. I think that—I think, Your Honor, that—

THE COURT: Or does it matter what the New Mexico statute says—

MR. WALSH: Well—

THE COURT:—since it's—anyway, go ahead.

MR. WALSH: Yes, Your Honor. It matters in that we have three felony DUI offenses, and it's going to be a question of law, obviously, as to whether those count under 924(e).

Now. as to the particular statute of 66-8-102, it matters to the extent that it lays out a felony offense for DUI. And those elements, you know, matter with respect to our argument that it fits under the otherwise clause.

I think that in terms of a particular statute as to whether it constitutes an offense in terms of having an element of the use of force, that does not matter, we contend, because again, were arguing that felony

DUI fits because of, again, [19] the otherwise clause, that the conduct involves serious potential risk of injury to another.

So it does not matter, I contend, that the felony DUI statute may not have an element as to use of force, because we're not arguing it fits there. We're arguing because it fits under, again, the otherwise clause of 924(e).

THE COURT: And I think your answer would be the same on this, but I believe the New Mexico Supreme Court has interpreted this felony DWI statute that, under the habitual offender statute in New Mexico—for example, you know, I think if you have three prior felonies, then you're subject to up to an eight-year enhancement.

And the New Mexico Supreme Court has determined that that felony DW—even though it's called felony DWI commonly does not meet up with—it's not a felony for purposes of applying individual offender statutes. So would your response be the same?

MR. WALSH: Yes, Your Honor. You know, again, we're not saying because it has an element regarding the use of force. We're going back and we're relying on our argument that it fits under the otherwise cause.

THE COURT: Okay,

MR. WALSH: Clause, rather. And again, from our view, that's why it fits, because it—felony DUI, the conduct of that offense certainly does pose a risk of physical injury [20] to another, the conduct itself.

So nothing further.

THE COURT: Okay, Ms. Katze, this is—Mr. Walsh, this is an issue that, obvious, you know, whichever

way I rule, I could easily see the Tenth Circuit reviewing. So I think I need to issue a detailed written ruling on this particular issue and then, after I do that, reset the matter to complete the sentencing phase. So on this legal issue, is there anything further you wish to state, Ms. Katze, that hasn't been addressed?

MS. KATZE: No. Your Honor, just to point out as well that, as has already been discussed between the Court and Mr. Walsh, that previously while visiting in our circuit, a decision had been made by a district court on the same issue and that he found as well that it was not a crime of violence.

THE COURT: Okay. What I'll do is I'll take this issue under advisement, issue a written ruling, and then, at that point, reset the matter for sentencing to complete it.

* * * *

[Reporter's Certificate omitted in printing]

Government's Exhibit 1

ELEVENTH JUDICIAL DISTRICT
COUNTY OF McKINLEY
STATE OF NEW MEXICO

[Filed MAR 30, 1998]

No. CR-98-000079-V

STATE OF NEW MEXICO,
Plaintiff,

vs.

LARRY W. BEGAY,
Defendant.

JUDGMENT AND SENTENCE

THIS MATTER having come before the Court on the 20th day of March, 1998, the Defendant being present with his attorney, Louis E. DePauli, Jr., the State of New Mexico represented by Gerald M. Byers, Assistant District Attorney, and the Defendant having pled guilty to the charge of Driving While Under the Influence of Intoxicating Liquor, a fourth or subsequent offense, a fourth degree felony which was committed on the 29th day of January, 1998, which crime was committed with the use of a motor vehicle, contrary to §66-8-102(G), NMSA 1978, as charged in the Criminal Information, as agreed in the Plea and Disposition Agreement which the Court approved, and the Court having accepted the Defendant's guilty plea, the Defendant is hereby found guilty of a fourth degree felony.

IT IS THEREFORE THE JUDGMENT AND SENTENCE of this Court that the Defendant be sentenced to the Department of Corrections for a period of 18 months, followed by one (1) year of parole, that said sentence be suspended except for one (1) year to be served in the Department of Corrections and that upon his release from prison the Defendant be placed on unsupervised probation for a period of six (6) months in accordance with the terms and conditions of a probation agreement to be entered into between the Defendant and the Probation and Parole Division of the Department of Corrections of the State of New Mexico, such agreement being made a part of the Judgment and Sentence as if fully set but herein.

/s/
GRANT L. FOUTZ
DISTRICT JUDGE

SUBMITTED BY:

/s/
Gerald M. Byers
Assistant District Attorney

/s/
Louis E. DePauli, Jr.
Attorney for Defendant

Government's Exhibit 2

ELEVENTH JUDICIAL DISTRICT
COUNTY OF McKINLEY
STATE OF NEW MEXICO

[Filed JAN 11, 2002]

No. CR-2001-275-II

STATE OF NEW MEXICO,
Plaintiff,

vs.

LARRY W. BEGAY,
Defendant.

JUDGMENT AND SENTENCE

THIS MATTER came before the Court on the 17th day of December, 2001, the State of New Mexico was represented by James I. Patterson, Assistant District Attorney, the Defendant was present with his attorney, R. David Pederson, the Defendant having previously pled guilty to the charge of PERSONS DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUG which was committed on the 24th day of November, 2000, contrary to §66-8-102(G), NMSA 1978, as agreed in the Plea and Disposition Agreement which the court approved, the Defendant is hereby found guilty of a fourth degree felony.

The Defendant has previously been convicted of 1) Driving While Under the Influence of Intoxicating Liquor, a second offense in Magistrate Court Cause NO. DR-807/LR, on April 9th, 1997 2) Driving While

Under the Influence of Intoxicating Liquor, a fourth offense in Magistrate Court Cause No. DR-97-112/LR, on April 9th, 1997 3) Driving While Under the Influence of Intoxicating Liquor, a fourth, or subsequent offense in District Court Cause No. CR-98-79-V, on March 20th, 1998, and the Court being fully advised in the premises,

IT IS THEREFORE THE JUDGMENT AND SENTENCE of this Court that for Count 1: Persons Driving Under the Influence of Intoxicating Liquor or Drug, the Defendant is sentenced to the McKinley County Adult Detention Center for three hundred sixty four (364) days, with the last thirty (30) days to be served at the Gallup Police Department DUI Facility. Defendant shall be placed on six (6) months supervised probation upon his release.

* * * *

/s/_____
JOSEPH L. RICH
DISTRICT JUDGE

SUBMITTED BY:

/s/_____
James I. Patterson
Assistant District Attorney

/s/_____
R. David Pederson
Attorney for Defendant

Government's Exhibit 3

THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF VALENCIA
STATE OF NEW MEXICO

[Filed JAN 14, 2002]

No. VA 00 319 CR
DA# VL 00 0609

STATE OF NEW MEXICO,
Plaintiff,

vs.

LARRY BEGAY,
Defendant.

JUDGMENT, PARTIALLY SUSPENDED SENTENCE AND COMMITMENT

On the 20th day of December, 2001, this case came before the Honorable William A. Sanchez, District Judge, for sentencing, the State appearing by Carlos Elizondo, Assistant District Attorney, the Defendant appearing personally and by his attorney Randy Chavez, and the Defendant having been convicted on December 20, 2001, pursuant to a Plea and Disposition Agreement, accepted and recorded by the Court, of the offense(s) of: **Aggravated Driving While Under the Influence of Intoxicating Liquor or Drugs, 4th or Subsequent and Driving While License Suspended or Revoked** contrary to NMSA 1978, Section §66-8-102-(D) & (G), and §66-5-39 a felony offense and a misdemeanor offense occurring on or about the 7th day of April, 2000.

The Defendant is hereby found and adjudged guilty and convicted of said crime(s).

IT IS THE JUDGMENT AND. SENTENCE of the Court that the Defendant be sentenced as follows:

a. For Count I, to 18 months incarceration with 1 year to he suspended for a total of 6 months incarceration and to pay a $700.00 fine.

b. For count II, to 364 days of incarceration with 334 days to be suspended for a total of 30 days of incarceration and a $300.00 fine

c. That the above sentences are to run consecutively for a total incarceration period of 7 months.

d. That the defendant, upon release, to be placed on supervised probation, for the remainder of time imposed. Sentence imposed in this matter is to run consecutive to any sentence currently being served from any other jurisdiction.

* * * *

THEREFORE, You, Cornell Corrections are hereby commanded to take the above-named Defendant in custody and confine him for the above term.

FURTHERMORE, You, the Sheriff of Valencia County New Mexico are hereby ordered to take the above-named Defendant in custody and deliver him to the custody of Cornell Corrections.

/s/_____
William A. Sanchez
DISTRICT JUDGE

APPROVED:

/s/_____	/s/_____
Carlos Elizondo	Randy Chavez
Assistant District Attorney	Attorney for Defendant

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed JUL 1, 2005]

Criminal No 04-2245 WJ

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LARRY BEGAY,
Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the issue of whether Defendant Larry Begay ("Defendant") should be sentenced as an armed career criminal pursuant to 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4 as a result of Defendant's three separate convictions for the felony offense under New Mexico law for driving while under the influence of intoxicating liquor ("DUI"), fourth or subsequent offense ("felony DUI").[1] For the reasons set forth in this Memorandum Opinion, the Court finds and concludes that Defendant is an armed career criminal within the meaning of 18 U.S.C. § 924(e) and U. S.S. G. § 4B1..4 and shall be sentenced accordingly.

Procedural and Factual Background

On January 24, 2005, Defendant plead guilty to a single count indictment charging him with felon in

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[1] Felony DUI in New Mexico is defined in the Motor Vehicle Code, NMSA 1978 § 66-8-102(G) (as amended). Upon conviction for a fourth DUI, a defendant is guilty of felony DUI.

possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2). The United States Probation Office prepared a Pre-Sentence Report ("PSR") which calculated Defendant's sentencing guideline imprisonment range to be 41-51 months based on an offense level of 15 and a criminal history category of VI. The Defendant did not submit formal written objections to any of the reported facts or the sentencing guideline range set forth in the PSR. The United States of America ("Government"), however, did object to the PSR on the basis that it failed to classify Defendant as an armed career criminal based on his criminal history.

The felon in possession of a firearm arose out of an incident involving the Defendant who, after a night of drinking alcoholic beverages, separately pointed a .22 caliber rifle at two female family members demanding money and then threatening to loll the two women by repeatedly pulling the trigger of the rifle. (PSR, ¶10-11). Fortunately for all concerned, the rifle was not loaded.

Paragraphs 32 through 64 of the PSR detail Defendant's adult criminal history. Since 1983, Defendant has amassed 22 DUI arrests of which 12 resulted in convictions. For purposes of this Memorandum Opinion, the Court will consider only Defendant's 12 DUI convictions since they form the basis of the Government's contention that Defendant should be sentenced as an armed career criminal. It should be noted, however, that in addition to Defendant's DUI criminal history, he has an extensive record of arrests and convictions in the Navajo Nation Tribal Court as well as various state courts in Arizona and New Mexico for offenses such as possession of liquor, public intoxication, reckless driving, just to name a few.

Defendant's 12 DUI convictions form the basis for his three felony DUI convictions arising out of the New Mexico State District Courts in the counties of McKinley and Socorro as reflected in Government exhibits 1, 2 and 3 admitted into evidence at the hearing on May 16, 2005. As previously noted, there is no dispute regarding Defendant's criminal history or his three separate convictions for felony DUI. What is disputed is whether the three felony DUI convictions can be the basis for sentencing Defendant as an armed career criminal.

LEGAL ANALYSIS

The Government contends that Defendant is an armed career criminal pursuant to 18 U.S.C. §924(e). U.S.S.G. § 4B1.4 implements 18 U.S.C. § 924(e) which mandates a statutory minimum term of incarceration of 15 years for a defendant (i) who is convicted of violating 18 U.S.C. § 922(g) (felon in possession of a firearm) and (ii) who has three previous convictions for a violent felony or a serious drug offense. The instant felony offense to which Defendant admitted is felon in possession of a firearm in violation of 18 U.S.C. § 922(g) and there is no dispute that Defendant has three separate convictions for felony DUI, a fourth degree felony punishable under New Mexico law by incarceration for a term not to exceed 18 months. *See* NMSA 1978 § 66-8-102(G) (as amended).[2] Therefore, the question of whether Defendant is an

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[2] Defendant argues in his Sentencing Memorandum (Doc. 27) that the offense of DUI is not punishable by imprisonment of more than one year While it is true that the maximum term of incarceration for the offense of DUI under New Mexico law is less than one year, NMSA 1978 § 66-8-102(G) clearly states the maximum term of incarceration for conviction of the offense of felony DUI is incarceration up to 18 months.

armed career criminal depends on whether felony DUI under New Mexico law is a crime of violence which is defined as any offense under federal or state, law, punishable by imprisonment for a term exceeding one year, that

1. Has as an element the use, attempted use or threatened use of physical force against a person of another or;
2. Is burglary of a dwelling, arson, or extortion involves use of explosives, ***or otherwise involves conduct that presents a serious potential risk of physical injury to another.***

See 18 U.S.C. § 924(e)(2)(B); U.S.S.G. § 4B1.2(a) (emphasis added).

Felony DUI under New Mexico law does not involve burglary of a dwelling, arson, extortion, the use of explosives or has as an element the use, attempted use or threatened use of physical force against the person of another. *Compare United States v. Rutherford*, 54 F.3d 370, 374 (7th Cir. 1995) (1st degree assault conviction under Alabama law for driving motor vehicle under influence of alcohol and causing bodily injury did not involve use of force prong of crime of violence definition), *cert. denied*, 516 U.S. 924 (Oct. 10, 1995) (No. 95-5811). Thus, in order for felony DUI under New Mexico law to constitute a crime of violence as that term is defined in the relevant statutory and sentencing guidelines provisions, the Court must find that felony DUI involves conduct that presents a serious potential risk of physical injury to another.

Defendant cites the recent United States Supreme Court case of *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004) for the general proposition that DUI is not a crime of

violence. The holding in *Leocal* was based on the specific language of 18 U.S.C. § 16 and in footnote 7 of the Opinion, the Supreme Court explicitly distinguished the sentencing guidelines definition of "crime of violence" as used in Section 4B1.2 from the statutory definition contained in 18 U.S.C. § 16. I agree with the Government that the *Leocal* decision is not controlling precedent on the issue of whether Defendant's convictions for felony DUI constitute crimes of violence under 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.2.

The Government refers to cases from the Fifth and Seventh Circuits which are more on point and support the Government's position that DUI offenses meet the definition of "crime of violence" under 18 U.S.C. § 924 and U.S.S.G. § 481.2. In *United States v. D. Santiago-Gonzales*, 207 F.3d 261 (5th Cir. 2000), the Fifth Circuit determined that DUI counts as a "crime of violence" under § 4B1.2. *Santiago-Gonzales* was an immigration case, but the § 4B1.2 definition of "crime of violence" was applied to defendant's three previous convictions in New Mexico for the misdemeanor offense of DUI for which Defendant had been given jail time on each conviction. *Id.* at 262.

In *United States v. Rutherford*, 54 F.3d at 375, the Seventh Circuit held that while the DUI offense at issue was not a crime of violence based on the use of force, the offense met the definition of the "otherwise" clause under § 4B1.2, since it involved a *risk* of injury. The Seventh Circuit emphasized that a court must focus on the conduct involved in the offense, and look for a "substantial risk" that the conduct presented a "serious risk of physical injury" rather than "conjecture" or "speculation" about possible harm. *Id.* The *Rutherford* Court concluded that

"[d]riving under the influence vastly increases the probability that the driver will injure someone in an accident." *Id.* at 376. Additionally, in the case of *United States v. McGill*, 347 F. Supp. 2d 1210, 1213-1214 (M.D.Ala. 2004), an Alabama district court recently ruled that the offense of felony DUI under Alabama law constituted a crime of violence, under § 4B1.2 of the sentencing guidelines.

This Court acknowledges that the Eighth Circuit has held that operating a motor vehicle while intoxicated under Iowa law does not constitute a crime of violence under U.S.S.G. § 4B1.2. *U.S. v. Walker*, 393 F3d. 819 (8th Cir.2005).[3] With all due respect to the Eighth Circuit and its well written opinion in *Walker*, I find the reasoning and holdings in *United States v. D. Sanfiago-Gonzales*, 207 F.3d 261 (5th Cir. 2000), *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995) and *U.S. v. McGill*, 347 F. Supp. 2d 1210 (M.D. Ala. 2004), to constitute more persuasive authority.

Moreover, I believe the Tenth Circuit Decision in *United States v. Farnsworth* provides additional authority in support of the conclusion I reach. *See*, 92 F.3d 1001 (10th Cir. 1996), *cert. denied*, 519 U.S. 1034 (Dec. 9, 1996) (No. 96-6662). While the relevant portions of the Tenth Circuit's Opinion in *Farnsworth* involved the propriety of enhancing the defendant's base offense level under U.S.S.G. § 2K2.1(a)(2), the Tenth Circuit noted that the commentary to §2K2.1 references the definition of "crime of violence" in § 4B1.2 which includes conduct that presents a seri-

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[3] Defendant and the United States Probation Office both cite and rely on another Eighth Circuit decision, *United States v. McCall*, 397 F.3d 1028 (8th Cir. 2005). However, by Order entered April 21, 2005, the Eighth Circuit withdrew its Opinion in *McCall*.

ous potential risk of physical injury to another and cited *Rutherford* on the dangers of drunk drivers:

> We agree with the Seventh Circuit that [t]he dangers of drunk dri ing are well-known and well-documented. Unlike other acts that may present some risk of physical injury, . . . the risk of injury from drunk driving is neither conjectural nor speculative. . . . Drunk driving is a reckless act that often results in injury, and the risks of driving while intoxicated are well known. This is sufficient to satisfy the "serious risk" standard of the "otherwise" clause [of] § 4B1.2(1)(ii).

Id. at 1008 -09.

Conclusion

Defendant's Sentencing Memorandum acknowledges that he is an alcoholic which is readily apparent from his extensive criminal history set forth in paragraphs 32 through 64 of the PSR. What is also readily apparent is that Defendant has done little, if anything, to seek help for his alcoholism or to change the behaviors that have lead to the extensive number of arrests for alcohol related offenses including the three felony DUI convictions arising under New Mexico law. Thus, the Court has no difficulty in reaching the conclusion that Defendant's three felony DUI convictions involve conduct that presents a serious potential risk of physical injury to another. Accordingly, Defendant shall be sentenced as an armed career criminal pursuant to 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4.

IT IS SO ORDERED.

/s/ William P. Johnson
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed JUL 15, 2005]

Criminal No. 04-2245 WJ

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LARRY BEGAY,
Defendant.

DEFENDANT'S MOTION TO RECONSIDER THE COURT'S MEMORANDUM OPINION AND ORDER

Larry Begay, by and through his attorney, Margaret Katze, Assistant Federal Public Defender files the following Motion to Reconsider the Court's Memorandum Opinion and Order.

On July 1, 2005 this Court filed its Memorandum Opinion and Order finding that DUI offenses meet the definition of a "crime of violence" under 18 U.S.C. §924(e) and U.S.S.G. §4B1.2. The Court found that due to Mr. Begay's three prior felony DUI convictions he should be sentenced as an armed career criminal with a minimum term of imprisonment of 15 years.

Mr. Begay urges the Court to reconsider its decision. When this Court makes a finding that conduct "presents a serious potential risk of physical injury to another" it is violating *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court increased the maximum range within which it exercised its discretion based

on facts neither admitted by Mr. Begay nor found by a jury, in violation of the Sixth Amendment right to trial by jury and the Fifth Amendment due process right to proof beyond a reasonable doubt. In determining that conduct "presents a serious potential risk of physical injury to another" the Court is making a finding of fact. A jury did not find that in Mr. Begay's particular case his DUIs involved conduct that presented a serious risk of physical injury to another. Mr. Begay never had an opportunity to litigate this issue at the time that he was charged with the felony DUIs. The Court does not have the authority to assess the risk of physical injury to another. No evidence was presented to show that DUI presents a serious potential risk of physical injury to another. Mr. Begay submits that while DUI may be a serious offense, statistically, there is not a serious potential risk that driving under the influence will cause physical injury to another.

If the Court is looking at Mr. Begay's DUI convictions and making a determination that those convictions presented a serious potential risk of physical injury than this is prohibited adjudicative fact finding. A judge cannot make findings of fact that increase the statutory maximum from 10 years to life. In taking a categorical approach the court must compare the elements of Mr. Begay's prior offense to the elements required by the enhancement law. *See Taylor v. United States*, 110 S.Ct. 2143 (1990). This is a statutory issue not a guidelines issue.

If this Court is looking at the possible world of all DUIs and making a finding that DUIs present a serious potential risk of physical injury to another, than the Court is violating the Separation of Powers and Non-delegation doctrines of Article I of the Con-

stitution. *See also, Mistretta v. United. States*, 109 S.Ct.647 (1989)(upholding delegation of law-making power to Sentencing Commission because it did not affect statutory maximum sentences). "In our system, so far as at least concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial functions." *U.S. v. Evans*, 333 U.S. 483, 486 (1948). The Court is engaging in a law making function. This function is reserved for Congress. Legislative fact-finding is done by the legislature. Determining whether a particular crime or conduct presents a serious potential risk of physical injury to another is determining a legislative fact.

Congress did not add DUI to the list of specific crimes that satisfied the definition of a violent felony for purposes of 18 U.S.C. §924(e). It is an unconstitutional delegation of law to courts to allow a court to engage in substantive law making. The non-delegation doctrine limits the authority of Congress to delegate lawmaking powers to the other two branches. There is no Supreme Court precedent that Congress may delegate to courts the power to determine maximum statutory sentences.

Whether the Court is making a decision that Mr. Begay's DUIs present a serious potential risk of physical injury to another (violating the jury's fact-finding function) or the Court is ruling that all DUIs present a serious potential risk of physical injury to another (violating the legislature's law-making function), the Court is operating outside its authority, and as such should reconsider its ruling and find that Mr. Begay should not be sentenced as an armed career criminal.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
111 Lomas NW, Suite 501
Albuquerque, NM 87102
(505) 346-2489

Electronically filed
Margaret A. Katze
Attorney for Defendant

[Certificate of Service omitted in printing]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed JUL 18, 2005]

Criminal No 04-2245 WI

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LARRY BEGAY,
Defendant.

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO RECONSIDER THE COURT'S MEMORANDUM OPINION AND ORDER

COMES NOW the Plaintiff, the United States of America, by and through its attorneys, David C. Iglesias, United States Attorney, and David M. Walsh, Assistant United States Attorney for said district, and does hereby respond to the Defendant's Motion to Reconsider the Court's Memorandum Opinion and Order:

1) The Defendant must be sentenced as an armed career miming for the reasons stated in the government's objections to the PSR and in the Court's Memorandum Opinion and Order filed on July 1, 2005. In his motion to reconsider, the Defendant cites to the case of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). However, *Apprendi* specifically excepted prior convictions from it holding, and the Tenth Circuit has clearly stated that the "government need not charge in an indictment and prove to a jury that a defendant's prior

conviction constitutes a 'violent felony' under § 924(e)." *United States v. Moore*, 401 F.3d 1220, 1226 (10th Cir. 2005).

2) The Defendant also argues that the separation of powers doctrine precludes the Court from determining that Felony DUI fits within the scope of 924(e). The government contends that a Court exercises its proper judicial functions when it rules as a matter of law that a particular conviction falls within the purview of 18 U.S.C. § 924(e). It is clear from a plain reading of the statute that there is no limited litany of offenses that may fall under the "otherwise clause" of the armed career criminal statute. The statute therefore contemplates that courts would interpret the law to determine which offenses fit and which do not. Accordingly, Courts across the nation have engaged in this judicial function, resulting in the development of case law that discuss various convictions within the context of 924(e). Further, cases that have specifically addressed the separation of powers argument in relation to the ACCA statute have rejected it. *See United States v. Neilson*, 141 F.3d 1161 (4th Cir. 1998)(Unpublished Opinion)(internal citations omitted)(Attached as Government Exhibit 1); *United States v. Martinez*, 122 F.3d 421 (7th Cir. 1997)(court did not violate separation of powers when it used a military conviction of housebreaking as a burglary offense under 924(e)).

For the foregoing reasons, the United States respectfully requests that the Court deny the Defendant's Motion to Reconsider the Court's Memorandum Opinion and Order.

Respectfully Submitted,

DAVID C. IGLESIAS
United States Attorney

Electronically filed on 7/18/05
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[Certificate of Service omitted in printing]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed JUL 19, 2005]

Criminal No. 04-2245 WJ

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LARRY BEGAY,
Defendant.

ORDER DENYING DEFENDANT'S
MOTION TO RECONSIDER

THIS MATTER comes before the Court on Defendant's Motion to Reconsider the Court's Memorandum Opinion and Order (Doc. 31) finding that Defendant is an armed career criminal within the meaning of 18 U.S.C. § 924(e) and USSG § 4B1.4.

In Defendant's Motion to Reconsider, he relies on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) for the proposition the Court's findings in its Memorandum Opinion and Order violated *Apprendi* The Court is of the opinion that Defendant's reliance on *Apprendi* is misplaced. As noted by the United States Court of Appeals for the Tenth Circuit in a recent decision, *Apprendi* specifically excepted prior convictions from its holding:

> We conclude . . . that *Apprendi* and Booker's exception for prior convictions subsumes inquiries into whether a given conviction constitutes a

> "**violent felony**." It is a question of law whether a felony meets the statutory definition of a "**violent felony**," and such a question does not trigger the Sixth Amendment concerns addressed in *Booker*. Furthermore, determining whether a prior conviction was for a "**violent felony**" involves an inquiry intimately related to whether a prior conviction exists, and therefore falls within the prior convictions exception to the *Apprendi* rule. . . We therefore conclude that the Government need not charge in an Indictment and prove to a jury that a Defendant's prior conviction constitutes a "**violent felony**" under 6924(e).

United States v. Moore, 401 F3d 1220, 1225-26 (10th Cir. 2005).

Defendant also argues that under the separation of powers doctrine, the Court is precluded from determining that felony 13151 under New Mexico law fits within the scope of 18 U.S.C. 924(e). The Court finds no merit in Defendant's separation of powers argument. Moreover, if interpreting a statutory provision by a Federal Judge violates the doctrine of separation of powers, then virtually every Federal Judge in the United States would be guilty of routinely violating the doctrine of separation of powers.

Defendant's Motion to Reconsider (Doc. 31) is denied.

IT IS SO ORDERED.

/s/ William P. Johnson
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed JUL 20, 2005]

Criminal No 04-2245 WJ

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LARRY BEGAY,
Defendant.

TRANSCRIPT OF CONTINUED SENTENCING

* * * *

[4] So with that, also state on the record that—and recognize the defendant's continuing objections to the findings that I made that his three prior felony DUI convictions under New Mexico law would trigger the armed career criminal enhancement under 924(e). So I'll recognize that objection, and I think, certainly, it's been preserved by the defendant.

* * * *

THE COURT: Okay. Now, Mr. Walsh, under the guidelines with the 924(e) enhancement, the statutory minimum is 15 years or 180 months. Now, in looking at the offense [5] level, however, I think, under the guidelines, the adjusted offense level would be 31, criminal history category of VI, which would establish a range of 188 to 235 months.

* * * *

THE COURT: All right. I think this is important to [6] note for the record because this was not in the original PSR; that with the armed career criminal, my having determined that the defendant's three previous felony DUI convictions triggers the 924(e): enhancement, then under 4B1.4 of the guideline's and specifically 4B1.4(b) (3) (A), the offense level for this defendant would be offense level 34 because the offense of conviction involved the use and possession of a firearm.

And then you take or subtract three levels for acceptance of responsibility. You then arrive at an offense level 31, criminal history category VI, which under the guidelines establishes a range of 188 to 235 months.

So that's—for the record, that's what I will determine the defendant's offense level, criminal history, and guideline sentencing range to be.

And so Ms. Katze.

MS. KATZE Your Honor, if I could just—I just briefly wanted to address my Motion to Reconsider the Court's Memorandum Opinion and Order, because I think perhaps I didn't express myself well because it appears that both the Court and the government—that I did not make myself clear with respect to the argument regarding *Apprendi*.

I'm not arguing that the Court cannot make a determination that Mr. Begay has those prior aggravated DWI convictions. My argument is not to the charge itself, but to the characteristics of the charge, and the conclusion based on [7] those.

My argument is that, if the Court can make a determination that the three DWIs meet the definition

of a crime of violence—in other words, that these present a serious potential risk of physical injury to another—the Court is either engaging in a factual determination which is the province of the jury when, as under *Apprendi*, the Court's factual determination that either Mr. Begay's specific DWIs involved the that they present the serious potential risk of physical injury to another and there had beep no evidence that his particular DWIs have—that they presented any serious potential risk of physical injury to another.

We do know as a fact that they did not result in physical injury to anybody, but the question is, did they present a serious potential risk of physical injury to another? No evidence has been presented to the Court, and the Court made that determination. So it's either making that determination as a factual determination—which my argument is that is in violation of *Apprendi*, because under *Apprendi* a court cannot make a factual determination that increases the statutory maximum. And in a sense, that's, what the Court has done. This was a ten-year Maximum, and now, the maximum possible sentence is life.

Alternatively, if the Court is not making a determination, a factual determination that Mr. Begay's [8] specific DUI/DWI convictions posed the potential, present a serious potential risk of physical injury to another, then it's My argument that the Court is engaging in lawmaking, a legislative function; that the Court is finding that the world of DWIs meet the definition of crime of violence because they necessarily present a serious potential risk of physical injury to another.

My argument is that, if the Court is engaging in the legislative fact-finding or law—it's lawmaking. And again, I think maybe between it wasn't clear, my

separation of powers argument, but that is that Congress can make a determination that a particular crime presents a serious potential risk of physical injury to another.

The Court, in this decision, has basically made that blanket finding. The Court has said DWIs present a serious potential risk of physical injury to another, and I think the evidence of the legislative fact-finding issue is the fact that there is a short list of crimes that specifically were delineated by Congress; and DWI, which is perhaps the most common conviction that is probably seen throughout the United States courts, was not in that list.

And then so the question is, does it fall in the catchall phrase? And it's my position the catchall, I guess, phrase or portion of the definition, it's our position that that is a legislative determination.

[9] So I just wanted to make clear for the record because it—the Court and the government indicated that I misapplied *Apprendi* in arguing that the Court cannot make a determination whether Mr. Begay has those convictions, and that is not my argument at all. It's not the fact of the conviction, it's the characterization of the conviction.

THE COURT: Mr. Walsh, do you want to say anything on this?

MR. WALSH: Your Honor, our response is basically summarized in our response brief to the defendant's Motion to Reconsider, and above and beyond that, I have nothing to provide the Court.

THE COURT: Well, in the order that I entered yesterday afternoon denying the Motion to Reconsider—and I'm going to read. Again, I'm relying on a Tenth

Circuit case, a recent one, and that is *United States versus Moore*, 401 F.3d 1220, at Pages 1225 to 1226, where the Tenth Circuit stated, "We conclude that *Apprendi* and *Booker's* exception for prior convictions subsumes inquiries into whether a given conviction constitutes a violent felony. It is a question of law whether. a felony meets the statutory definition of a violent felony, and such a question does not trigger the Sixth Amendment concerns addressed in *Booker*.

"Furthermore, determining whether a prior conviction was for a violent felony involves an inquiry intimately related [10] to whether a prior conviction exists and therefore falls within the prior conviction's exception to the *Apprendi* rule. We therefore conclude that the government need not charge in an indictment and prove to a jury that a defendant's prior conviction constitutes a violent felony under 924(e)."

And then certainly, the separation of powers issue is preserved for appeal, but I don't find merit to it because I view my role as interpreting a statutory provision. And if I'm guilty of violating the doctrine of separation of powers by interpreting a statutory provision, then as I noted in the order, every federal judge in the United States is likewise guilty of violating the separation of powers because federal judges are routinely called upon to interpret statutory provisions enacted by Congress.

* * * *

[13] THE COURT: Okay. All right. I've reviewed the Presentence Report's factual findings and have considered the sentencing guideline applications, including the finding I made sustaining the government's objection and overruling the defendant's point, that the defendant meets the armed career criminal

provisions of 18 924(e) and U.S. Sentencing Guideline Section 4B1.4, which were where the guidelines incorporate 18U.S.C. 924(e).

The basis for that finding—and I'll note that there are circuits—at this point, there is a split in authority. The defendant has—his criminal history reflects 22 arrests for DUI, 12 convictions out of state court; that is, three separate convictions under New Mexico law for the offense of felony DUI.

Now, the Eighth, Circuit, applying, I believe it was, Iowa law, basically held that the equivalent of felony DUI under Iowa law would not trigger the armed career criminal enhancement and, particularly, that it's the otherwise clause that states, "or involves conduct that presents a serious [14] potential risk of physical injury to another."

The Seventh and the Fifth Circuits have gone the other way, and so the Tenth Circuit, I guess, is going to get a chance to determine whether, in the Tenth Circuit, felony DUI fits the criteria for the definition of crimes of violence under 18 U.S.C. 924(e).

Under the guidelines, the defendant's offense level is 31, criminal history category is VI, and that would establish a guideline imprisonment range of 188 to 235 months.

* * * *

[16] Therefore, the sentence imposed, the defendant will be committed to the custody of the Bureau of Prisons for a term of 188 months.

* * * *

[Reporter's Certificate omitted in printing]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

[Filed JUL 29, 2007]

Case Number: 1:04CR02245-001WJ
USM Number: 26839-051
Defense Attorney: Margaret Katze

UNITED STATES OF AMERICA

v.

LARRY BEGAY

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☒ pleaded guilty to count(s) Indictment
☐ pleaded nolo contendere to count(s)
☐ after a plea of not guilty was found guilty on count(s)

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count Number(s)
18 U.S.C. Sec. 922(g)(1)	Felon in Possession of a Firearm, 18 U.S.C. Sec. 924(a)(2)	9-25-2004	

The defendant is sentenced as specified in pages 2 through 5 of this judgment. The sentence is imposed under the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count.

☐ Count dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

McKinley
County of Residence

7/20/2005
Date of Imposition of Judgment

/s/: William P. Johnson
Signature of Judge

Honorable William P. Johnson,
United States District Judge
Name and Title of Judge

7/29/2005
Date Signed

IMPRISONMENT

The defendant is committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 188 months.

☒ The court makes these recommendations to the Bureau of Prisons:

The Court recommends a Bureau of Prisons facility experienced with and sensitive to Native American culture.

The Court recommends any additional substance abuse treatment programs available through the Bureau of Prisons. The Court recommends the defendant participate in the Bureau of Prisons 500 hour drug and alcohol treatment program.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant must surrender to the United States Marshal for this district:

- ☐ at on
- ☐ as notified by the United States Marshal.

☐ The defendant must surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on
- ☐ as notified by the United States Marshal
- ☐ as notified by the Probation or Pretrial Service Office.

RETURN

I have executed this judgment by:

Defendant delivered on _____ to _____ at _____ with a Certified copy of this judgment.

_____
United States Marshal

_____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. The defendant shall not commit another federal, state or local crime. The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the probation officer.

☐ The above drug testing condition is suspended based on the courts determination that the defendant possesses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm or destructive device. (Check, if applicable).

☒ The defendant will submit to DNA collection in compliance with statutory requirements while incarcerated in the Bureau of Prisons, or at the direction of the United States Probation Office. (Check, if applicable).

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable).

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable).

If this judgment imposes a fine or restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall obtain and maintain full time, legitimate employment, or attend a vocational or academic training program through-

out the term of supervised release as directed by the probation officer;

6. the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. as directed by the probation officer, the defendant shall notify third parties of risks that

may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant must participate in and successfully complete a substance abuse treatment program which may include drug testing, outpatient counseling, or residential placement. The defendant may be required to pay a portion of the cost of treatment and/or drug testing as determined by the Probation Office.

The defendant must refrain from the use and possession of alcohol and other forms of intoxicants. Be must not frequent places where alcohol is the primary item for sale.

The defendant must participate in and successfully complete a mental health treatment program, which may include outpatient counseling, residential placement, or prescribed medication as approved by the probation officer. The defendant may be required to pay a portion of the cost of this treatment as determined by the Probation Office.

The Defendant shall not operate a motor vehicle without the written approval of his probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments.

	Assessment	Fine	Restitution
TOTALS	$ 100	$0.00	$0.00

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

A ☒ In full immediately; or

B ☐ $ immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

Special instructions regarding the payment of criminal monetary penalties: Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.

Consistent with a stipulation in the Plea Agreement, the defendant forfeits his rights, title, and interest in a Marlin, model Glenfield .75C, .22 caliber rifle, serial number 2331287.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed DEC 12, 2006]

No 05-2253

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LARRY BEGAY,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. NO. CR-04-2245 WJ)

Margaret A. Katze, Assistant Federal Public Defender, Albuquerque, New Mexico, for Defendant-Appellant.

David N. Williams, Assistant United States Attorney, (David C. Iglesias, United States Attorney, with him on the brief), Albuquerque, New Mexico for Plaintiff-Appellee.

Before **LUCERO**, **HARTZ**, and **McCONNELL**, Circuit Judges.

HARTZ, Circuit Judge.

Larry Begay was sentenced to 188 months' imprisonment after pleading guilty to one count of being a felon in possession of a firearm in violation of 18

U.S.C. § 922(g)(1). The district court determined that each of Mr. Begay's three previous felony convictions for driving while intoxicated was a "violent felony" under the Armed Career. Criminal Act (ACCA), 18 U.S.C. § 924(e). *See United States v. Begay*, 377 F. Supp. 2d 1141 (D.N.M. 2005). On appeal Mr. Begay contends that (1) felony driving while intoxicated is not a violent felony under the ACCA, and (2) the district court violated *United States v. Booker*, 543 U.S. 220 (2005), in concluding that it could not impose a sentence below the Guidelines range if a sentence within that range would be reasonable. We have jurisdiction under 28 U.S.C. § 1291 and hold that (1) felony driving while intoxicated is a violent felony under the ACCA, and (2) a district court may impose a sentence outside the Guidelines range even if a sentence within the range would be reasonable. Accordingly, we affirm in part, reverse in part, and remand for resentencing.

I. BACKGROUND

According to the presentence report (PSR), in September 2004 Mr. Begay threatened to shoot his sister, Annie Begay, with a rifle if she did not give him money. When she informed him that she did not have any money, he repeatedly pulled the trigger, but the rifle did not fire. The next morning she called the Navajo Department of Law Enforcement while he was asleep. Officers responded and found a .22 caliber rifle under a mattress inside his room.

Mr. Begay pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). According to the PSR, Mr. Begay had 12 previous convictions for driving while intoxicated (DWI). Three of these convictions were felonies under New Mexico law, which makes the fourth and each sub-

sequent DWI conviction a felony. *See* N.M. Stat. Ann. § 66-8-102(G)—(J) (1978) ("Upon a fourth conviction pursuant to this section, an offender is guilty of a fourth degree felony and . . . shall be sentenced to a term of imprisonment of eighteen months. . . . Upon a fifth conviction . . . an offender . . . shall be sentenced to a term of imprisonment of two years. . . ."). The district court determined that a felony DWI is a "violent felony" under the ACCA. With convictions for three such felonies, Mr. Begay was subject to a mandatory minimum sentence of 15 years' imprisonment under the ACCA, *see* 18 U.S.C. § 924(e)(1), and his offense level under the United States Sentencing Guidelines (USSG) was 34, *see* USSG § 4B1.4(a) ("A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal."); *id.* § 4B1.4(b)(3)(A) (setting offense level for armed career criminal at 34 "if the defendant used or possessed the firearm or ammunition in connection with . . . a crime of violence"). A three-level downward adjustment for acceptance of responsibility, *see id.* § 3E1.1, combined with Mr. Begay's prior convictions, which placed him in criminal-history category VI, resulted in a sentencing range of 188 to 235 months.

At sentencing, Mr. Begay contended that the Guidelines range was higher than necessary to accomplish the goals set forth in the list of sentencing factors in 18 U.S.C. § 3553(a). He requested a sentence of 180 months, the minimum permitted under the ACCA. His counsel noted that Mr. Begay had been plagued by alcoholism "for the better part of his life," and that "he has almost no other conviction other than drinking and—while driving, and also, that his DWI cases do not—have not resulted in physical injury to another." R. Vol. III at 10. He also noted that Mr.

Begay's father and brother had died in a car accident and Mr. Begay "had assumed almost completely the role of caretaker in the family compound. . . . He was responsible for taking care of all the livestock, for hauling wood and water for the family." *Id.* at 11. The district court considered each of the sentencing factors in 18 U.S.C. § 3553(a) and concluded that "in order for me to go below the guidelines, I have to make a finding that, under the sentencing factors, the sentence of 188 months is unreasonable." *Id.* at 15. The court continued:

> Again, taking a look at the guidelines, the way they're formulated and how they apply, how the Sentencing Commission has formulated the calculation of the guidelines if the armed career criminal enhancement applies, I cannot make a finding that 188 months is unreasonable under 18 U.S.C., under the sentencing factors of 18 U.S.C. 3553(a).

Id. at 16. The court sentenced Mr. Begay to 188 months' imprisonment and adjourned.

II. DISCUSSION

A. Violent Felony

1.

The relevant portion of the ACCA definition of *violent felony* is:

> *any crime punishable by imprisonment for a term exceeding one year*, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, *that*—

> (I) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.

18 U.S.C. § 924(e)(2)(B) (emphasis added). To determine whether an offense is a "violent felony" under the ACCA, we follow the categorical approach set forth by the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005); that is, we look only to the statutory definition of the crime. *See United States v. Moore*, 420 F.3d 1218, 1220 (10th Cir. 2005). Mr. Begay's three felony convictions were for violations of N.M. Stat. Ann. § 66-8-102A, which states: "It is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state." Mr. Begay contends that this crime is not a "violent felony" under the ACCA. We review questions of statutory interpretation de novo. *See Moore*, 420 F.3d at 1220.

Mr. Begay argues that the "otherwise" clause in § 924(e)(2)(B)(ii) embraces only offenses "that present[ ] a serious potential risk of physical injury to another" in the same way as the specifically enumerated crimes—burglary, arson, extortion, or crimes involving explosives. Because DWI is dissimilar to these enumerated crimes, he concludes, it is not a violent felony under the ACCA.

Mr. Begay cites as authority the Eighth Circuit's opinion in *United States v. Walker*, 393 F.3d 819 (8th Cir. 2005), *overruled by United States v. McCall*, 439

F.3d 967 (8th Cir. 2006) (en banc). The issue in *Walker* was "whether Iowa's offense of Operating While Intoxicated ('OWI') is a 'crime of violence' under the United States Sentencing Guidelines." 393 F.3d at 820. The district court had ruled that Mr. Walker was a career offender under USSG § 4B1.1(a), which provides that a defendant is a career offender if he "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." The Guidelines definition of *crime of violence appears* in USSG § 4B 1.2(a):

> The term "crime of violence" means *any offense* under federal or state law, *punishable by imprisonment for a term exceeding one year, that—*
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is *burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

(emphasis added). As *Walker* noted, "The portions of U.S.S.G. § 4B1.2 at issue are identical to the corresponding portions of 18 U.S.C. § 924(e)(2)(B), except that the guideline provision adds the phrase *of a dwelling* after the word *burglary*." *Walker*, 393 F.3d at 823. It then said, "Since the pertinent language is substantially identical, . . . we will construe [the] guideline language at issue to be consistent with the corresponding language in the [ACCA]." *Id.* at 823.

> The court began its analysis of the definition as follows:
>
> The "otherwise" clause of § 4B 1.2[(a)](2) follows an enumeration of specific crimes: burglary of a

> dwelling, arson, extortion, and crimes that involve the use of explosives. Where general words follow specific words in a statutory enumeration, the established interpretative canons of *noscitur a sociis* and *ejusdem generis* provide that the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.

Id. at 824. This conclusion, the court stated, "is reinforced by the legislative history of the statute from which the guideline was derived," the ACCA. *Id.* After quoting two paragraphs from the relevant Report of the House Committee on the Judiciary, it observed:

> For present purposes, the most important sentence of this lengthy quotation is the last one, which states that the legislation would add "burglary, arson, extortion, use of explosives and *similar crimes* as predicate offenses where the conduct involved presents a serious risk of injury to a person." . . . Thus, the legislative history reinforces the view that the intent of the "otherwise" clause in 18 U.S.C. § 924(e)(2)(B)(ii) was to encompass crimes similar to burglary, arson, extortion, and crimes that involve the use of explosives.

Id. at 824-25 (quoting H.R. Rep, No. 99-849, at 3 (1986)).

Walker also relied on language in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), in which the Supreme Court held that the offense of driving under the influence (DUI) under Florida law was not a "crime of violence" as defined in 18 U.S.C. § 16, and therefore not an "aggravated felony" under § 101(a)(43)(F) of the Immi-

gration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F). Section 16 defines *crime of violence* as

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The court in *Walker* quoted the following from *Leocal*:

> In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term "crime of violence." The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses. *Cf. United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.) (observing that the term "violent felony" in 18 U.S.C. § 924(e) . . . "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence"). Interpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the "violent" crimes Congress sought to distinguish for heightened punishment and other crimes.

Leocal, 543 U.S. at 11. Deeming it particularly important that the Supreme Court had "cited with approval [a] passage from then Chief Judge Breyer's opinion in *Doe* stating that drunk driving should not be consid-

ered as a 'violent felony' under 18 U.S.C. § 924(e)," the court in *Walker* quoted the pertinent passage from the future Justice's opinion holding that possession of a firearm is not a "violent felony" under the ACCA:

> [T]o read the statute . . . to cover firearm possession [ ] would also bring within the statute's scope a host of other crimes that do not seem to belong there. To include possession [of a firearm], one would have to focus upon the risk of direct *future* harm that present conduct poses. But how could one then exclude, say, drunken driving or unlawful transportation of hazardous chemicals or other risk-creating crimes very unlike the burglary, arson, extortion, and explosives use that the statute mentions? There is no reason to believe that Congress meant to enhance sentences based on, say, proof of drunken driving convictions. Rather, we must read the definition in light of the term to be defined, "violent felony," which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence.

Walker, 393 F.3d at 826 (ellipsis and brackets in *Walker*) (quoting *Doe*, 960 F.2d at 225).

The *Walker* court reasoned: "It is common sense that OWI is not the same kind of offense as the crimes specifically listed in U.S.S.G. § 4B 1.2(a)(2). . . . The latter are hostile, aggressive acts. They create a significant risk of violent confrontation between the criminal and the victim or the law enforcement officer." *Id.* at 825. It concluded, "Since drunken driving—or more precisely, operating while intoxicated—is very unlike the crimes specifically named in § 4B1.2(a)(2), under the rule of *ejusdem generis*, OWI is not encom-

passed by the general language that follows." *Id.* at 826.

Finally, *Walker* stated that its interpretation of the definition of *crime of violence* complied with "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Id.* (internal quotation marks omitted).

> Here, the government construes U.S.S.G. § 4B1.2(a)(2) to encompass all conduct that presents a serious potential risk of physical injury to another. That construction not only ignores the list of specific crimes that precede this general language and therefore modify it, that construction also would render the list of specific crimes redundant or superfluous.

Id. at 827. In addition, said the court, the government's interpretation would

> render superfluous the distinction in § 4B1.1(a) and § 4B1.2 between a felony that is a crime of violence and a felony that is a controlled substance offense. . . . On the government's argument, the inclusion of controlled substance offenses as separately named predicate offenses for career offender status would be superfluous because those offenses involve a substantial risk of physical injury to another and therefore would be included in the "otherwise" provision of § 4B1.2(a). Our interpretation of § 4B1.2(a)(2), however, preserves the distinction between subsections (a)(1), (a)(2), and (b); and it avoids a construction that renders any part of § 4B1.2 superfluous.

Id. Mr. Begay raises these same arguments in hope that this court will reach the same conclusion.

The government contends that we are bound by our rejection of *Walker* in *Moore*, 420 F.3d at 1221-22. *Moore* held that "felony [driving under the influence] is a crime of violence under USSG § 4B1.2." *Id.* at 1220. "Driving while intoxicated," we stated, "clearly presents a 'serious potential risk of physical injury to another.'" *Id.* at 1221. If we were addressing whether DWI is a "crime of violence" under § 4B1.2 of the Guidelines, the Government would be correct. But on this appeal we are not applying that guideline; rather, we are construing a provision under the ACCA.

At first blush this seems to be a distinction without a difference, because the language we are considering is virtually identical to the language considered in *Moore*. *Moore*, however, relied on more than the plain language of § 4B1.2. It also pointed to, commentary to that Guidelines provision. We observed that "the analysis in *Walker* ignores the more flexible articulation of § 4B1.2's 'crime of violence' definition explained in its commentary section." *Id.* We noted that in that commentary,

> this "or otherwise" language is removed, and the inclusion of offenses with conduct posing a serious potential risk of physical injury is delinked from any preceding specific sequence of offenses. Instead, the commentary gives a long list of crimes of violence ranging from murder to kidnapping to extortion and then, in a separate sentence, explains that "[o]ther offenses are included as 'crimes of violence' if . . . the conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented

> a serious potential risk of physical injury to another."

Id. at 1221-22 (internal citation omitted). Ordinarily, such "commentary is a binding interpretation of the phrase 'crime of violence'" in the Guidelines. *Stinson v. United States*, 508 U.S. 36, 47 (1993). But, of course, Guidelines commentary is not binding with respect to the ACCA, even if the language in that statute is identical to Guidelines language interpreted in the commentary. Thus, *Moore* is not controlling.

Nevertheless, we believe that *Moore's* construction of § 4B1.2 is also correct for the ACCA. We reach the same conclusion as the en banc decision of the Eighth Circuit in *McCall*, 439 F.3d at 969, which overturned *Walker*, and the decisions of the other circuits to address the language at issue, *see United States v. Sperberg*, 432 F.3d 706 (7th Cir. 2005) (felony DWI is a violent felony under the ACCA), *United States v. DeSantiago-Gonzales*, 207 F.3d 261, 264 (5th Cir. 2000) (DUI is a crime of violence under USSG § 4B1.2(a)(2)); *United States v. Veach*, 455 F.3d 628 (6th Cir. 2006) (same);. *United States v. McGill*, 450 F.3d 1276, 1280 (11th Cir. 2006) (same).

McCall addressed "whether a felony DWI conviction in Missouri is a violent felony under the 'otherwise involves' provision in § 924(e)(2)(B)(ii)." 439 F.3d at 969. The court rejected *Walker's* reliance on *Leocal*, noting that *Leocal*

> held that the plain language of [18 U.S.C.] § 16(b) . . . limits that statute to "violent, active crimes" because the word "used" incorporates a *mens rea* component and thus requires that an offender's conduct be more than "merely accidental or negligent."

> By contrast, as the *Leocal* opinion noted, [543 U.S.] at 10 n.7[1], the "otherwise involves" provision in § 924(e)(2)(B)(ii) is not so limited. It focuses on "conduct that *presents* a serious potential risk of physical injury to another," not on the intent of the offender.

Id. at 971.

The *McCall* court also thought that *Walker's* reliance on *noscitur a sociis* and *ejusdem generis* was misplaced, because "[w]hen a statute's plain language is this clear, it is controlling, . . . without the need to refer to [these] canons of construction . . . ." *Id.* Likewise, it said, "contrary hints in the legislative history" could not overcome the clear statutory language, *id.*, and in any event, that history undermines, rather than supports *Walker's* reliance on canons of construction. *McCall* explained:

> [T]he enumerated crimes and the word "otherwise" were *added* to the "involves conduct" lan-

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[1] Footnote 7 in *Leocal* states:

> Thus, § 16(b) plainly does not encompass all offenses which create a "substantial risk" that injury will result from a person's conduct. The "substantial risk" in § 16(b) relates to the use of force, not to the possible effect of a person's conduct. Compare § 16(b) (requiring a "substantial risk that physical force against the person or property of another may be used"), with [USSG] § 4B1.2(a)(2) . . . (in the context of a career-offender sentencing enhancement, defining "crime of violence" as meaning, *inter alia*, "conduct that presents a serious potential risk of physical injury to another"). The risk that an accident may occur when an individual drives while intoxicated is simply not the same thing as the risk that the individual may "use" physical force against another in committing the DUI offense.

> guage. The form of the addition made the "otherwise involves" provision look like a catchall when in fact it was initially the operative provision. Adding the enumerated crimes served the obvious purpose of including all prior convictions for those crimes (burglary, arson, extortion, use of explosives), regardless of whether they present a serious potential risk of physical injury. Given this drafting sequence, it is wrong to infer that Congress intended to limit the "otherwise involves" provision to offenses that are similar to the enumerated add-ons.

Id. (internal citation. omitted). (This circuit relied on this same legislative history in *United States v. King*, 479 F.2d 801, 803 (10th Cir. 1992), to declare that the crimes covered by the "otherwise" clause were not restricted to property crimes.)

Finally, addressing the First Circuit's opinion in *Doe, McCall* stated: "[T]hough we give due regard to contrary dicta in *Doe* which cautioned against construing the 'otherwise involves' provision to include risk-creating crimes 'that do not seem to belong there,' we conclude that we must construe the provision consistent with its plain language." *Id.* (internal citation omitted). Thus, the court concluded that "a violent felony within the meaning of § 924(e)(2)(B)(ii) includes any crime whose elements involve conduct that necessarily presents a serious potential risk of physical injury to another." *Id.*

2.

We agree with the holdings of *McCall* and the Seventh Circuit in *Sperberg*. First, DWI is encompassed by the natural meaning of the statutory language "any crime . . . that . . . involves conduct that

presents a serious potential risk of physical injury to another." DWI certainly presents such a risk. Many would say that the gravest risk to their physical safety from criminal misconduct is from drunken drivers. When the dissent states that its construction of § 924(e) captures "ordinary meaning," it is apparently referring not to the meaning of the above, quoted language but to the term defined by that language—namely, *violent felony*. Surely, however, we should look to the statutory definition of the term and begin with the ordinary meaning of that language rather than with the "ordinary meaning" of the term that Congress thought it advisable to define. Even less should we rely on the short title of the statute, "The Armed Career Criminal Act." The term *armed career criminal* appears nowhere in the United States Code, not even in the heading to any codified provision. It would be rather unusual, and disrespectful to legislative drafting, to let such a title override statutory language. The Racketeer Influenced and Corrupt Organizations chapter of the Criminal Code, 18 U.S.C. §§ 1961 et seq., is not interpreted by restricting its reach to entities that are described by the ordinary meaning of the title; instead, courts refer to the statutory language. We should do likewise here.

3.

Second, statutory purpose does not suggest a different definition. Section 924(e) is a punishment provision. It states that particularly severe sentences should be imposed on certain violators of 18 U.S.C. § 922(g) (which prohibits the possession of firearms by various classes of people, including, and typically, convicted felons)—namely, those who have repeatedly committed "violent felonies." But how to define such felonies for this purpose?

It is revealing that Congress could have adopted the same language that appears in the definition of *crime of violence* in the very same statutory section, 18 U.S.C. § 924(c)(3). (This statutory definition of *crime of violence* was added by Pub. L. No 99-308 on May 19, 1986; it is a slight variation of the definition of *crime of violence* in 18 U.S.C. § 16, which was enacted in 1984. The definition of *violent felony* was added by Pub. L. No. 99-570 on October 27, 1986.) The definition of *crime of violence* is:

> an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). A detailed examination of the differences between the definitions of *crime of violence* and *violent felony* is less important than the observation that there are differences. The reason for the differences must be that the definitions serve distinct purposes. The definition in § 924(c) was used to create a criminal offense. Under § 924(c)(1)(A), "any person who, during and in relation to any crime of violence . . . , uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm" is subject to punishment for a separate offense with a minimum sentence of five years' imprisonment. In other words, when someone while committing a "crime of violence" uses or carries a firearm or possesses a firearm in furtherance of that crime, then that person has violated § 924(c). Undoubtedly, Congress defined

crime of violence in this context to capture those crimes in which the danger is magnified by the firearm. It is not surprising that DWI is not a "crime of violence," because a firearm in the car does not increase the danger from the DWI offense. The dissent's view of *violent felony* would seem to conform to the purpose for defining *crime of violence* as it appears in § 924(c).

But the term *violent felony* serves a different purpose. The definition of *violent felony* in § 924(e)(2)(b) is used to identify persons who should be sentenced to very long terms for their present offense (possession of a firearm by a convicted felon) because of their criminal history. One may disagree with the choice, but it seems perfectly reasonable to include within the definition those who have a confirmed history of displaying contempt for human life or safety—those who, in the statutory language, have repeatedly committed felonies "involv[ing] conduct that presents a serious potential risk of physical injury to another." From this perspective, there is nothing remarkable about including felony DWI as a "violent felony."

In that regard, it is significant that the five circuits to address the issue have held that the term *crime of violence* in the Sentencing Guidelines, USSG § 4B1.2(a), which is defined identically to the term *violent felony* in § 924(e) (and, ironically, not identically to the statutory definition of *crime of violence* in § 924(c)) encompasses DWI. To be sure, as already noted above, our construction of § 924(e) is not controlled by our decision in *Moore*, 420 F.3d 1218, interpreting USSG § 4B1.2(a), because *Moore* relied, at least in part, on Sentencing Commission commentary to the definition—commentary which is ordinarily binding in interpreting the Guidelines. Nevertheless, one may well ask why the Sentencing Commission apparently

adopted a definition in this context broad enough to include felony DWI. And the answer must again lie in the context; the Sentencing Commission was considering what type of criminal history indicates that a person is so dangerous that a long term of incarceration is appropriate, regardless of the present offense of conviction. That is essentially the same context for which Congress defined *violent felony*. The Sentencing Commission's expertise on sentencing issues counsels us to defer to its construction of the same language confronting us in this case, even though the formal grounds for deference are inapplicable.

Thus, both the natural meaning of the statutory language and the apparent statutory purpose support a construction of the term *violent felony* to include felony DWI. Neither the legislative history nor canons of construction persuade otherwise. The only legislative history referred to by disputants on this issue is, as usual, of little help, nor do canons of construction assist in distinguishing between the constructions of the statutory language embraced by the parties on this appeal.

The legislative history relied upon by the opposing opinions in the Eighth Circuit's *McCall* case is a statement in a report by the House Committee on the Judiciary:

> [One] major question involved in these hearings was as to what violent felonies involving physical force against *property* should be included in the definition of "violent" felony. The Subcommittee agreed to add the crimes punishable for a term exceeding one year that involve conduct that presents a serious potential risk of physical injury to others. This will add State and Federal crimes against property such as burglary, arson, ex-

> tortion, use of explosives and similar crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person.

H.R. Rep. No. 99-849, at 3 (1986). To begin with, it is worth noting that the committee report does not say that the definition includes *only* the enumerated and similar crimes. The emphasis placed in legislative history on one effect of a statute does not mean that it has no others. For example, when Congress imposed limits on civil-rights suits by prisoners, Members repeatedly noted problems caused by suits challenging prison conditions. Nevertheless, the statutory language compelled us also to apply those limits on other civil-rights claims. *Cf. Robbins v. Chronister*, 435 F.3d 1238 (10th Cir. 2006) (rejecting contention that it would be absurd to apply the provision to civil-rights claim that arose before prisoner was incarcerated).

More importantly, the quoted committee report did not address the final language of the statute, but rather the version before addition to § 924(e)(2) of the language "is burglary, arson, or extortion, involves use of explosives, or otherwise" (what I will call the "specific language"). In other words, it referred only to the language "involves conduct that presents a serious potential risk of physical injury to another" (what I will call the "general language"). One can speculate from this history either (1) that the addition of the specific language was to make clear (in case one disagreed with the committee report's view of the general language) that the term *violent felony* encompassed the newly listed offenses, from which one can infer that the general language is to be read broadly as not being limited to crimes like the newly added offenses (the view of the *McCall* majority) or (2) the

addition of the specific language was to suggest that the general language should be read narrowly to encompass only offenses similar to the newly listed ones (the view of the *McCall* dissent). I think the *McCall* majority view is the more plausible, but it is impossible to know. This ambiguous history is not particularly persuasive either way.

Nor are canons of construction—in particular, *ejusdem generis* and *noscitur a sociis*—helpful in this case. These two canons state that a term in a series should be understood in a limited sense that the term shares with the others in the series. The word to be so limited in the phrase "conduct that presents a serious potential risk of physical injury to another" is the word *conduct*. But how is the meaning of *conduct* to be limited? The statute itself says that the conduct must "present[ ] a serious potential risk of physical injury to another." One could certainly say that this limitation is also a feature, perhaps the essential common feature, of the enumerated crimes: burglary, arson, extortion, and crimes involving the use of explosives. But the dissent would be more restrictive. "Each of the[ ] enumerated crimes," it says, "involves violent, aggressive conduct." Dissent Op. at 5. It is questionable, however, whether opening an unlocked front door to a home for the purpose of committing larceny is "violent" conduct (and if not, should burglary count only if committed in a "violent" manner?); and one could reasonably describe felony DWI as both "violent" and "aggressive." It is important to recognize the rather limited role of the *ejusdem* and *noscitur* canons in the enterprise of statutory construction. The Supreme Court appears to reject their application as often as it embraces them. *See, e.g., Garcia v. United States*, 469 U.S. 70 (1984) (rejecting application of *ejusdem generis* when terms in series are each

separated by "or"). And when it embraces them, one wonders whether they are critical to the Court's reasoning or makeweight additions to an argument based on deeper principles. Whatever the value of these two canons, they cannot be used to make fine distinctions regarding what common features of terms in a series should be imposed on a more general term in the series. I do not see how these canons can inform us that the word *conduct* should be restricted any more than it is by the statute's modifying phrase "that presents a serious potential risk of physical injury to another."

Moreover, there is a particularly compelling reason not to apply these two canons in this case. The statutory language at issue defines *violent felony* as "any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary, arson, or extortion, involves use of explosives, or *otherwise* involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B) (emphasis added), Mr. Begay contends that "conduct that presents a serious potential risk of physical injury to another" should be interpreted as restricted to conduct *like* burglary, arson, etc. But the primary definition of *otherwise* is "in a different way or manner." Webster's Third New International Dictionary 1598 (2002). Thus, the otherwise clause is best understood not as saying "conduct that presents (*in the same way* that burglary, arson, etc., do) a serious risk of physical injury to another," but rather "conduct that presents (*in a manner different from* burglary, arson, etc.) a serious risk of physical injury to another." The use of *otherwise* in the statute negates the two canons.

In sum, the ordinary, natural meaning of § 924(e)(2)(B) encompasses DWI. Although other considerations can, and do, override ordinary meaning in some circumstances, I am not persuaded that such circumstances are present here. I therefore would apply ordinary meaning and reject Mr. Begay's argument. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.")

B. Reasonableness of Sentence

Mr. Begay contends that the district court violated *Booker* at sentencing when it stated that it could not impose a sentence below the Guidelines range unless a sentence within that range would be unreasonable. Counsel for Mr. Begay had requested a sentence of 180 months and proffered several reasons why such a sentence would fulfill the purposes of sentencing set forth in 18 U.S.C. § 3553(a). After hearing these arguments, the court stated:

> Now, in order at this point and noting the defendant's continuing objection, the low end of the guideline—applicable guideline range is 188 months. The statutory minimum is 180 [months], and so in order for me to go below the guidelines, I have to make a finding that, under the sentencing factors, the sentence of 188 months is unreasonable.
>
> Again, taking a look at the guidelines, the way they're formulated and how they apply, how the Sentencing Commission has formulated the calculation of the guidelines if the armed career

> criminal enhancement applies, I cannot make a finding that 188 months is unreasonable under 18 U.S.C., under the sentencing factors of 18 U.S.C. § 3553(a).
>
> Therefore, the sentence imposed, the defendant will be committed to the custody of the Bureau of Prisons for a term of 188 months.

R. Vol. III at 15-16. The court then addressed the terms of supervised release, imposed a fine, notified Mr. Begay of his right to appeal, and adjourned the hearing.

1. Merits

We agree with Mr. Begay that the district court erred. In *Booker*, 543 U.S. 220, the Supreme Court held that mandatory application of the Guidelines violated the Sixth Amendment. To remedy the violation, it made the Guidelines advisory. Appellate review of a sentence would henceforth be for "unreasonableness." *Booker*, 543 U.S. at 261-62. In other words, so long as the district court's sentence is reasonable, we will affirm it. *See United States v. Kristl*, 437 F.3d 1050, 1053-54 (10th Cir. 2006).

Although the. Guidelines "continue to be the 'starting point' for district courts and for this court's reasonableness review on appeal," *United States v. Terrell*, 445 F.3d 1261, 1264 (10th Cir. 2006), they impose no rigid boundaries on what sentences are permissible. In any given case there could be a range of reasonable sentences that includes sentences both within and outside the Guidelines range. *Booker* and § 3553(a) do not require the district court to limit itself to those reasonable sentences within the Guidelines range. The court may impose a non-Guidelines sentence if the sentencing factors set forth in § 3553(a) warrant

it, even if a Guidelines sentence might also be reasonable. The district court misconceived *Booker* when it said otherwise.

2. Relief/Preservation

Having determined that the district court erred, we must next resolve whether Mr. Begay is entitled to relief. He failed to object in district court to the court's error. Ordinarily, this failure would require that we limit our review to plain error, *see United States v. Gonzalez-Huerta*, 403 F.3d 727, 732 (10th Cir. 2005) (en banc), so that we could set aside Mr. Begay's sentence only if he demonstrates that "there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings," *id.* (internal quotation marks omitted). In this case, we doubt that Mr. Begay could surmount the final requirement. *See id.* at 736-37.

Nevertheless, in certain circumstances we have excused a defendant's failure to object to an error by the district court when imposing sentence. We have relied on the provision in Fed. R. Crim. P. 51(b) that states, "If a party does not have the opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party." Mr. Begay argues: "The distinct court did not explain until it announced Mr. Begay's sentence that it would not impose a sentence below the guideline range unless it found the guideline range to be unreasonable. Thus, the error was not apparent until it was too late to object." Aplt. Br. at 33.

In support of his position Mr. Begay cites *United States v, Bartsma*, 198 F.3d 1191 (10th Cir. 1999). In *Bartsma* the district court imposed a special condi-

tion of supervised release without giving notice to the defendant. The defendant did not object to the condition, but this court ruled that the issue had not been waived, We stated:

> Mr. Bartsma had no notice the district court was considering the special condition until the court stated its tentative sentence near the beginning of the sentencing hearing. . . . [T]he complete lack of notice made it impossible for the parties to anticipate the nature of the special condition and short-circuited the significance of any opportunity to comment.

Bartsma, 198 F.3d at 1198; *accord United States v. Bruce*, No. 05-2150, 2006 WL 2349216, at *8 (10th Cir. Aug. 15, 2006). Although the sentencing error in this case was not imposition of a special condition of supervised release, it was an error that Mr. Begay would have had no reason to anticipate. *Cf. United States v. Barajas*, 331 F.3d 1141, 1144 (10th Cir. 2003) (issue was not preserved when "defense counsel had constructive notice that the challenged conditions of release might be imposed" and failed to object); *United States v. Lopez-Flores*, 444 F.3d 1218, 1220-21 (10th Cir. 2006) (reviewing for plain error the defendant's claim that his sentence was unreasonable because the district court did not justify it under the § 3553(a) factors). Nothing in the record suggests that Mr. Begay should have been prepared for the district court's novel interpretation of *Booker*. Indeed, the government makes no attempt to distinguish *Bartsma*. Accordingly, we will follow *Bartsma* in excusing Mr. Begay's failure to object to the district court's error at the time of pronouncing sentence.

We must reverse and remand for resentencing unless the government can establish that the error was harmless. *See* Fed. R. Crim. P. 52(a). But the government fails to argue harmless error. Nor could it do so successfully. The sentence imposed was at the bottom of the Guidelines range. We cannot say whether the district court would have imposed the same sentence if it had properly understood the post-*Booker* legal landscape. This "places us in the zone of speculation and conjecture." *United States v. Labastida-Segura*, 396 F.3d 1140, 1143 (10th Cir. 2005). Thus, remand is required so that the district court can determine whether it should impose a lower sentence, even though a sentence within the Guidelines range may indeed be reasonable.

III. CONCLUSION

We AFFIRM the district court's ruling that Mr. Begay is subject to a mandatory minimum sentence under 18 U.S.C. § 924. We REVERSE and REMAND for resentencing in light of our holding that the district court violated *Booker* at sentencing.

LUCERO, J., concurring.

Following my careful review of my respected colleagues' separate expressions in this case, as well as the record, the legislative history, and the pertinent cases, I join the opinion of Judge Hartz, save for Part II(A)(3). I do not disagree with much of what Judge McConnell has said, but ultimately conclude that the language of the statute is so clear and unambiguous that it does not allow resort to the legislative history. 18 U.S.C. § 924(e)(2)(B)(ii) unequivocally reaches a myriad of crimes—burglary, arson, extortion, the use of explosives, "*or* [a crime that) *otherwise* involves conduct that presents a serious potential risk of physical injury to another" (emphasis added). In agreeing with Judge Hartz, the Eighth Circuit sitting en Banc, and a panel of the Seventh Circuit, I conclude that a conviction for felony driving while under the influence falls within the ambit of the quoted statutory text.

Judge McConnell is right to highlight the dramatic increase in sentence that results from application of the Armed Career Criminal Act to Larry Begay's case. I agree that driving while under the influence may not have been in the minds of the 1986 amendment's sponsors when they drafted the residual language in § 924(e)(2)(B)(ii). Nevertheless, the wording that Congress chose is clear. If a change is to be made, it is for Congress, not the courts, to make.

McCONNELL, J, dissenting in part.

The majority holds that serial drunk driving is a violent felony for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). As a result, it finds that the defendant was properly sentenced to over fifteen years in prison for a crime that otherwise

would entail a Guidelines range of 41-51 months. I respectfully dissent.

The case arose when Mr. Larry Begay, a 44-year-old Navajo, threatened family members with an unloaded rifle and later pled guilty to unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Based on an offense level of 15 and a criminal history category of VI, the ordinary Guidelines range for this offense would be 41-51 Months, which is a very substantial sentence. But that is not the end of the story. Mr. Begay has a long history of drinking and driving, though fortunately he has never injured anyone. Under New Mexico law, the first three convictions for driving while intoxicated (DWI) are misdemeanors, but subsequent DWIs are classified as fourth-degree felonies, punishable by a term of eighteen months or, upon a fifth conviction, of two years. N.M. Stat. Ann. § 66-8-102-(G)-(J). Mr. Begay has been convicted of DWI in New Mexico twelve times, which means that he has committed more than three. felonies. Under the ACCA, any person convicted of unlawful possession of a firearm who has three previous convictions for a "violent felony" is subject to a mandatory minimum sentence of fifteen years and a Guidelines range of 188-235 months. 18 U.S.C. § 922(g); U.S.S.G. § 4B1.4. The district court concluded that serial DWI is a "violent felony," and sentenced Mr. Begay to a term of 188 months in prison.

The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed

> by an adult, that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*;

18 U.S.C. § 924(e)(2)(B) (emphasis added). The majority joins with the two other courts of appeals that have held felony DWI to be a "violent felony" within the meaning of this statute.[2] *See United. States v. McCall*, 439 F.3d 967 (8th Cir. 2006) (en banc): *United States v. Sperberg*, 432 F.3d 706 (7th Cir.

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[2] This Court and four other courts of appeals have held that felony DWI is a crime of violence under the identical language of U.S.S.G. § 4B1.2(a)(2)). *United States v. Moore*, 420 F.3d 1218, 1220 (10th Cir. 2005); *United States v. DeSantiago-Gonzales*, 207 F.3d 261,264 (5th Cir. 2000); *United States v. Veach*, 455 F.3d 628 (6th Cir. 2006); *United States v. McGill*, 450 F.3d 1276, 1280 (11th Cir. 2006); *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995). I agree with the majority that these precedents are distinguishable, because the Sentencing Commission's commentary to § 4B 1.2(a)(2), which is ordinarily "binding on the federal courts," *Stinson v. United States*, 508 U.S. 36, 46. (1993), employs a broader interpretation of § 4B 1.2(a)(2) than is evident from the language of § 924(e). See Maj. Op. 10-11. We owe deference to the Sentencing Commission's commentary notes interpreting the Commission's Guidelines, but do not owe deference to the Commission in interpreting acts of Congress, even when those acts contain wording identical to. a Guideline. In effect, because the Guideline commentary note omits the key word "otherwise," the cases interpreting U.S.S.G. § 4B 1.2(a)(2)) are not interpreting an identically worded provision.

An unpublished decision of this Court, *United States v. Gwartney*, 2006 WL 2640616 (10th Cir. 2006), recently held that "*Moore* clearly binds the panel" in a case under the ACCA. This panel unanimously rejects the view that *Moore* is so Controlling.

2005).[3] It is with the greatest hesitation that I part company with these decisions. But I am convinced that to treat drunk driving convictions, however numerous, as "violent felonies" is unwarranted by the language of the ACCA and is contrary to the intent of Congress.

In interpreting the term "crime of violence" in another portion of the criminal code, a unanimous Supreme Court recently observed that the "ordinary meaning of this term suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses." *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004). To be sure, that holding does not directly apply to this case, which involves a different statute with slightly different wording (though the Court's reliance on the "ordinary meaning" of the defined term would seem equally applicable here). But in reaching its interpretation in *Leocal*, the Court quoted from an earlier First Circuit decision, written by then Circuit Judge Stephen Breyer, which interpreted the term "violent felony" in our statute, the ACCA, 18 U.S.C. § 924(e), as "call[ing] to mind a tradition of crimes that involve the possibility of more closely related, active violence." *Id.* at 11 (quoting *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992)). The Supreme Court also cited this Court's observation in *United. States v. Lucio-Lucio*, 347 F.3d 1202, 1205-06

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[3] The Seventh Circuit in *Sperberg* relied on its prior precedent in *Rutherford*, which was an interpretation of U.S.S.G. § 4B1.2(a)(2). *See Sperberg*, 432 F.3d at 708 (finding no distinction between an interpretation of USSG § 4B 1.2(a)(2) and of 18 U.S.C. § 924(e)). Since the majority recognizes (correctly) that an interpretation of U.S.S.G. § 4B1.2(a)(2) is not controlling with respect to § 924(e), Maj. Op. 11, *Sperberg* can have no persuasive value here.

(10th Cir. 2003), in connection with yet another subsection of the ACCA, that interpreting the term "crime of violence" to encompass accidental or negligent conduct, such as drunk driving, "would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Leocal*, 543 U.S. at 11. These comments and citations strongly suggest that the Supreme Court does not view drunk driving as within the "violent" category of crimes Congress singled out for heightened punishment, under any of these similar but not identical statutes.

Mr. Begay argues that felony drunk driving does not fall within the meaning of the statutory term "violent felony," and that interpretation of the statute to include felony drunk driving is contrary to the purpose of the statute, its legislative history, and several hoary canons of statutory interpretation. The en banc Eighth Circuit and the concurrence in this case resist resort to legislative intent and canons of interpretation on the ground that the language of the statute is "plain." *McCall*, 439 F.3d at 971 ("we must construe the provision consistent with its plain language"); *id.* ("When a statute's plain language is this clear, it is controlling, without regard to contrary hints in the legislative history and without the need to refer to the canons of *noscitur a sociis* and *ejusdem generis*"); Concur. Op. 1 ("the wording that Congress chose is clear"). The opinion for the Court does not appear to agree that the language is "plain," but instead looks to legislative history and other outside indications of congressional meaning.

Unlike the concurrence, I find the language of § 924(e) anything but "plain," and in light of evidence of legislative intent and canons of construction, I be-

lieve the language favors the defendant. The ACCA defines "violent felony" as including any crime punishable by more than one year in prison that either "has as an element the use, attempted use, or threatened use of physical force against the person of another" or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The question is whether felony drunk driving qualifies under the second of these definitions.

This definition is susceptible to two linguistically plausible interpretations. The first, favored by the government, has been dubbed the "all crimes" interpretation. *See McCall*, 439 F.3d at 977 n.8 (Lay, J., dissenting), Under this interpretation, a violent felony is any crime, regardless of its nature, that involves conduct presenting a serious potential risk of physical injury to another. The examples that precede the "otherwise involves" clause, under this interpretation, do not limit or narrow the scope of the definition, but rather are listed to make sure that the crimes of burglary, arson, extortion, and crimes using explosives are categorically included.

The second, favored by the defense, has been dubbed the "similar crimes" interpretation. *Id.* at 977 n.9. Under this interpretation, the general phrase "otherwise involves conduct that presents a serious potential risk of physical injury to another" is limited to crimes of a nature similar to the enumerated crimes of burglary; arson, extortion, and crimes using explosives. Each of these enumerated crimes involves violent, aggressive conduct; each is characteristic of the armed career criminal, the eponym of the statute. In the words of the First Circuit in *Doe*, 960 F.2d at

225, quoted with approval by the Supreme Court in *Leocal*, 543 U.S. at 11, these are "crimes that involve the possibility of more closely related, active violence." Moreover, each of the enumerated crimes is potentially more dangerous when firearms are involved, which is evidently the reason Congress imposed so severe a penalty on persons who have committed these crimes who later are found in possession of a firearm. Both sides appear to agree that drunk driving is not of this nature. Although it undoubtedly entails risk of physical injury to others, drunk driving is a crime of negligence or recklessness, rather than violence or aggression; it is not characteristic of career criminals; and its dangers are unrelated to the presence or use of firearms. The question in this case therefore comes down to which interpretation of the statute is correct. If the "all crimes" interpretation is correct, drunk driving is included; if the "similar crimes" interpretation is correct, drunk driving is not included.

Looking first at the language chosen by Congress, I consider the "similar crimes" interpretation more persuasive. The key is Congress's use of the term "otherwise." Under the "all crimes" interpretation adopted by the majority, the word "otherwise" is surplusage. The statute is interpreted as if Congress had defined "violent felony" as any felony that "is burglary, arson, or extortion, involves use of explosives, or . . . involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B) (omitting the word "otherwise"). That is not the statute Congress wrote. By using the word "otherwise," Congress indicated a substantive connection between the enumerated crimes and the general phrase. Rather than covering *all* felonies involving "conduct that presents a serious potential risk of physical

injury to another," Congress limited coverage to felonies that "otherwise" involve such a risk—in other words, felonies that, while not identical to burglary, arson, extortion, or explosives offenses, impose a similar sort of risk.

Other indicia of meaning support this interpretation. The Supreme Court has repeatedly stated that "'[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *U.S. Nat. Bank of Ore. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (*quoting United States v. Heirs of Boisdore, 8* How. 113, 122, 12 L.Ed. 1009 (1850)); *see also Dole v. Steelworkers*, 494 U.S. 26, 35 (1990). Given the history and purpose of the ACCA, as well as the context of the "otherwise" clause in the statute, felony driving while intoxicated simply does not fit with the other crimes enumerated and contemplated by § 924(e).

When confronted with another question regarding the interpretation of 18 U.S.C. § 924(e)(2)(B)(ii)—the meaning of "burglary"—the Supreme Court took its bearings from a detailed examination of the history and purposes of the provision. *Taylor v. United States*, 495 U.S. 575, 581-90 (1990). The Court concluded that "Congress focused its efforts on career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Id.* at 587-88. The Court interpreted the statutory term "burglary" in terms of that general purpose. *See id.* at 590 ("These observations about the purpose and general approach of the enhancement provision enable us to narrow the range of possible meanings of the term

'burglary.'"). Applying the same method here, it seems beyond question that drunk drivers fall outside any reasonable understanding of Congress's definition of an "armed career criminal." Drunk drivers do not drive drunk "as their means of livelihood," and the threat they pose to other persons has nothing to do with whether they possess weapons.[4]

More specific legislative history confirms the "similar crimes" interpretation. The first version of the ACCA sentencing enhancement, enacted by Congress in 1984, applied to any convicted felon found guilty of possession of a firearm who had three previous convictions for robbery or burglary. *Taylor*, 495 U.S. at 581. In 1986, Congress debated two proposals for expanding the reach of the enhancement. The broader proposal would have included any felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* at 583 (quoting S. 2312, 99th Cong., 2d Sess. (1986); H.R. 4639, 99th Cong., 2d Sess. (1986)). If enacted, this enhancement would have included crimes, such as vandalism, that involve the use of physical force against

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[4] The opinion for the Court would have us discount Congress's purpose of targeting career criminals, arguing that it would be "disrespectful to legislative drafting[ ] to let such a title override statutory language." Maj. Op. 15. Yet in *Taylor*, in determining the meaning of the statutory term "burglary," the Supreme Court relied heavily on the connection between that term and the congressional object of heavily punishing "armed career criminals." *Taylor* 495 U.S. 587-90. It can hardly be improper for us to use the same interpretative approach here. Moreover, the legislative history, both originally and in the amendments relevant to this case, makes clear that the title—the "Armed Career Criminal Act"—was not merely decorative. *See* H.R. Conf. Rep. 98-1159 (1984).

property even if there was no substantial risk of injury to a person. The narrower proposal would have applied the enhancement to "any State or Federal felony that has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* (quoting H.R. 4768, 99th Cong., 2d Sess. (1986)). If enacted, this bill would have excluded burglary and arson, which do not contain as an element the use of force against a person. The bill that ultimately was enacted was a compromise: it extended the definition of "violent felony" to those not involving the use of physical force against a person if there was "serious risk of physical injury to another." *Id.* at 586. The House Committee on the Judiciary explained:

> [One] major question involved in these hearings was as to what violent felonies involving physical force against *property* should be included in the definition of 'violent' felony, The Subcommittee agreed to add the crimes punishable for a term exceeding one year that involve conduct that presents a serious potential risk of physical injury to others. This will add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and *similar crimes* as predicate offenses where the conduct involved presents a serious risk of injury to a person.

Id. at 587 (quoting H.R Rep. No 99-849 (1986) (first emphasis in original, second emphasis added)). This legislative history makes clear that Congress intended the expanded definition to cover only "similar crimes"—that is, crimes "similar" to burglary, arson, extortion, and use of explosives. For reasons already explained, that does not include drunk driving.

The *McCall* decision's contrary interpretation of the legislative history is based on the notion that the "otherwise involves" clause of § 924(e)(2)(B) was drafted first, and that the enumerated crimes were "add-ons":

> [T]he enumerated crimes and the word "otherwise" were *added* to the "involves conduct" language. The form of the addition made the "otherwise involves" provision look like a catchall when in fact it was initially the operative provision. Adding the enumerated crimes served the obvious purpose of including all prior convictions for those crimes (burglary, arson, extortion, use of explosives), regardless of whether they present a serious potential risk of physical injury. Given this drafting sequence, it is wrong to infer that Congress intended to limit the "otherwise involves" provision to offenses that are similar to the enumerated add-ons.

McCall, 439 F.3d at 971 (internal citations omitted). With all respect, I think this is a misleading interpretation. To be sure, the version of the amendment immediately prior to the addition of the "otherwise involves" language did not enumerate the crimes of burglary, arson, extortion, and use of explosives, but this has to be viewed in a broader context. Congress was amending the 1984 version of the statute, which applied explicitly to robbery and burglary, and only to those crimes. These were not "enumerated add-ons," as the *McCall* opinion calls them, but were the statutory foundation on which the congressional deliberations were based. The entire thrust of the 1986 debates was to expand the statute to encompass other crimes that warranted the same treatment already given to robbery and burglary. The only question was how far to go. In answering that question,

we need not "infer" that Congress intended to limit the provision to "offenses that are similar to the enumerated [crimes]," as the *McCall* opinion states. *Id.* The House Judiciary Committee report explicitly tells us: "This will add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and *similar crimes* as predicate offenses where the conduct involved presents a serious risk of injury to a person." *Taylor*, 495 U.S. at 587 (quoting H.R.Rep. No. 99-849 (1986) (emphasis added).

Moreover, the statutory language adopted by Congress contradicts the *McCall* opinion's interpretation. According to *McCall*, "[a]dding the enumerated crimes served the obvious- purpose of including all prior convictions for those crimes (burglary, arson, extortion, use of explosives), regardless of whether they present a serious potential risk of physical injury." *McCall*, 439 F.3d at 971. But this interpretation is belied by Congress's use of the word "otherwise." Whatever else it may mean, the term "otherwise" unmistakably indicates that Congress believed the enumerated crimes *do* present a substantial potential risk of physical injury to others (presumably because burglary, arson, extortion, and explosives crimes frequently, even if not invariably, erupt into violence). It makes no sense to refer to crimes that "otherwise involve" such a risk if the previously listed crimes do not do so. The listed crimes were not "enumerated add-ons"; they were illustrative or even paradigmatic.

The opinion for the Court apparently favors the *McCall* opinion's analysis of the legislative history, but ultimately places little or no weight on it See Maj. Op. 20 ("I think the *McCall* majority view is the more plausible, but it is impossible to know. This ambiguous history is not particularly persuasive either

way."). The opinion for the Court instead emphasizes what it considers to be the "ordinary meaning" of the defined term, Maj. Op. 14, reenforced by an analysis of the statutory purpose. I have already explained why I consider the "similar crimes" interpretation the more plausible rendition of the statutory language. The Court's analysis of statutory purpose warrants additional response.

The opinion for the Court notes that Congress used two different, though similar, terms—"crime of violence" and "violent felony"—in the same statutory section. *Compare* 18 U.S.C. § 924(c)(3) ("crime of violence") *with* § 924(e)(2)(B) ("violent felony"). The term "crime of violence" is defined in such a way that drunk driving is excluded. The opinion for the Court invites us to infer that the more ambiguous language of § 924(e)(2)(B) must lead to the opposite conclusion. The problem with this argument is that the definitions of the two terms vary in a number of different ways. In some respects, § 924(c)(3) is the broader provision, and in some respects it is the narrower. Section 924(c)(3) is broader, for example, in that it includes all crimes with a substantial risk of physical force against *property*, not just against persons; it is narrower in that it is confined to crimes involving the risk of the use of "force." No doubt an intensive analysis could reveal the unifying rationale for all these differences, but it is not immediately apparent.

The opinion for the Court, however, offers a theory. According to that theory, the important distinction is that § 924(c)(3) defines a separate offense, while § 924(e)(2)(B) imposes an enhanced sentence for the present offense on those who have committed violent felonies in the past. Maj. Op. 17. That is true. But the fact that one provision creates a separate offense

while the other imposes a higher sentence for the present offense does not cast much light on the question in this case, because it does not provide any general rationale for the differences between the provisions. If § 924(c)(1)(A) were narrower in all, or even most, respects, one might surmise that Congress was more circumspect in creating a new crime than in imposing an enhanced penalty; but that explanation does not meet these facts.

Nor is the Court's more specific analysis of the statutory purpose of the two provisions more helpful. According to the Court:

> The definition in § 924(c) was used to create a criminal offense. Under § 924(c)(1)(A), "any person who, during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm" is subject to punishment for a separate offense with a minimum sentence of five years' imprisonment. In other words, when someone while committing a "crime of violence" uses or carries a firearm or possesses a firearm in furtherance of that crime, then that person has violated § 924(c). Undoubtedly, Congress defined *crime of violence* in this context to capture those crimes in which the danger is magnified by the firearm. It is not surprising that DWI is not a "crime of violence," because a firearm in the car does not increase the danger from the DWI offense.

Id. at 16-17. On the other hand, according to the opinion for the Court:

> The definition in § 924(e)(2)(b) is to identify persons who should be sentenced to very long terms

> for their present offense (possession of a firearm by a convicted felon) because of their criminal history. One may disagree with the choice, but it seems perfectly reasonable to include within the definition those who have a confirmed history of displaying contempt for human life or safety—those who, in the statutory language, have repeatedly committed felonies "involv[ing] conduct that presents a serious potential risk of physical injury to another." From this perspective, there is nothing remarkable about including felony DWI as a "violent felony."

Id. at 17. The opinion for the Court thus concludes that a "crime of violence" under § 924(c)(l)(A) is limited to "those crimes in which the danger is magnified by the firearm," which does not include DWI, while "violent felony" under § 924(e)(2)(B) extends more broadly to "those who have a confirmed history of displaying contempt for human life or safety," which does include DWI.

Neither half of this analysis is persuasive. While the Court's interpretation of § 924(c)(1)(A) as focusing on "crimes in which the danger is magnified by the firearm" is eminently sensible, there is no reason not to apply the same logic to § 924(e)(2)(B). That section, after all, imposes its enhanced penalty only on those whose present offense involves the unlawful possession of a firearm. The Court's surmise that "it seems perfectly reasonable to include within the definition [under § 924(e)(2)(B)] those who have a confirmed history of displaying contempt for human life or safety" substantially broadens the target of the statute, beyond anything in the language or legislative history of the statute. If that were the congressional purpose, why limit the enhanced penalty to those who commit firearms offenses?

The "similar crimes" interpretation is further supported by at least two established canons of statutory construction. The doctrine of *noscitur a sociis*, meaning "a word is known by the company it keeps," is often applied to a general term that "is capable of multiple meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Similarly, under the doctrine of *ejusdem generis*, "[w]here general words fallow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (internal quotation marks omitted). Both canons confirm the "similar crimes" interpretation. The opinion for the Court reminds us that the Supreme Court "appears to reject [the canons'] application as often as it embraces them." Maj. Op. 20. Even the case cited by the Court, however, acknowledges that use of *ejusdern generis* is "firmly established" when a statute's meaning is uncertain. *Garcia v. United States*, 469 U.S. 70, 74 (1984) (quoting *United States v. Powell*, 423 U.S. 87, 91 (1975)). Under these rules of construction, the ACCA's "otherwise" clause should be restricted to violent, active crimes which, like burglary, arson, extortion, and crimes involving explosives, are typical of career criminals, and which are more dangerous when committed in conjunction with firearms.

The opinion for the Court also rejects the canons on the ground that it is not obvious that all burglaries—for example "opening an unlocked front door to a home for the purpose of committing larceny"—are "violent." Maj. Op. 21. But this is just to quibble with Congress's judgment that, in the typical case, burglary is a

crime that is likely to explode into violence risking substantial injury to the householder. It is well established that whether a crime is a violent felony must be determined on a categorical basis, not on the specific facts of the case. *Taylor*, 495 U.S. at 600-01. I do not argue that Mr. Begay's DWI offenses are not "violent felonies" because he did not hurt anyone (though he did not), but because, on a categorical basis, the crime of DWI does not have the typical attributes of a violent felony, as defined in the statute.

Finally, it bears mention that the rule of lenity may apply. This Court has stated that "we will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *United States v. Diaz*, 989 F.2d 391, 393 (10th Cir. 1993) (internal citations omitted). *See, e.g., United States v. Giles*, 213 F.3d 1247 (10th Cir. 2000) (using lenity to hold that "patches" are not "goods" under the law governing trafficking in counterfeit labels); *United States v. Bazile*, 209 F.3d 1205 (10th Cir. 2000) (using lenity to overturn a mandatory life sentence under U.S.S.G. § 2K2.4(a)); *United States v. Wicklund*, 114 F.3d 151 (10th Cir. 1997) (invoking lenity to overturn the district court's contrary interpretation of a murder-for-hire statute). To be sure, "a court must first consult 'all available relevant materials,' and invoke the rule of lenity only as a tie-breaker when ordinary means of discerning statutory meaning leave the issue in 'equipoise.'" *United States v. DeGasso*, 369 F.3d 1139, 1149 (10th Ch. 2004) (quoting *United States v. Wilson*, 10 F.3d 734, 736 (10th Cir. 1993); *United States v. Ruiz-Gea*, 340 F.3d 1181, 1188 (10th Cir. 2003)). I am inclined to think the rule of lenity is not

needed in this case because the defendant should prevail under other approaches to statutory interpretation. But the opinion for the Court declines to find the language of § 924(e) "plain"; it finds the legislative history "not particularly persuasive either way" (Maj. Op. 20); it concludes that the canons of statutory interpretation are of little help (*id.* at 21); and it offers only speculation regarding congressional purpose (*id.* at 15-17). In such a case, the rule of lenity should tip the scales.

The "similar crimes" interpretation thus finds support in an impressive array of interpretive methods: ordinary meaning, avoidance of surplusage, consistency with general statutory purposes, specific legislative history, and two canons of construction, plus the rule of lenity. I therefore conclude that 18 U.S.C. § 924(e)(2)(B)(ii) should be given the "similar crimes" interpretation, and that under that interpretation, felony DWI is not a "violent felony." I respectfully dissent from Part IIA of the opinion for the Court. I join Part IIB.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed February 21, 2007]

No. 05-2253

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LARRY BEGAY,
Defendant-Appellant.

ORDER

Before LUCERO, HARTZ, and McCONNELL, *Circuit Judges.*

Appellant's petition for rehearing is denied. Judge McConnell dissents from the denial.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH SHUMAKER, Clerk

by: /s/ [illegible]
Deputy Clerk

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No. 06-11543

IN THE

Supreme Court of the United States

LARRY BEGAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

Is felony driving while intoxicated a "violent felony" for purposes of the Armed Career Criminal Act?

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OPINIONS BELOW

The opinion of the United S ates Court of Appeals for the Tenth Circuit is reprinted in the Joint Appendix (JA) at 78-121. It is also available at 470 F.3d 964 (10th Cir. 2006). The opinion of the United States District Court for the District of New Mexico is reprinted in the JA at 46-52 and is also available at 377 F. Supp. 2d 1141 (D.N.M. 2005).

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued an opinion affirming the application of the Armed Career Criminal Act ("ACCA") to Larry Begay on December 12, 2006. JA 78-121. The Tenth Circuit Court of Appeals denied Mr. Begay's petition for rehearing on February 21, 2007. JA 122. Mr. Begay timely filed his petition for writ of certiorari on May 22, 2007. *See* 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1 & 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution is attached to this brief as Appendix A.

The Sixth Amendment to the United States Constitution is attached to this brief as Appendix B.

Section 922(g) of Title 18 of the United States Code is attached to this brief as Appendix C.

Section 924(a)(2) of Title 18 of the United States Code is attached to this brief as Appendix D.

Section 924(e) of Title 18 of the United States Code is attached to this brief as Appendix E.

New Mexico Statute § 31-18-15 (2001) is attached to this brief as Appendix F.

New Mexico Statute § 66-8-102 is attached to this brief as Appendix G.

STATEMENT OF THE CASE

Over objection, the district court held that Larry Begay's three recidivist driving while intoxicated ("DWI") convictions subjected him to the fifteen-year mandatory minimum of the Armed Career Criminal Act ("ACCA"), on the ground that recidivist DWI is a "violent felony," pursuant to the "otherwise" clause of 18 U.S.C. § 924(e)(2)(B)(ii). Absent application of the ACCA, the district court would have determined Mr. Begay's sentence in light of a sentencing guideline range of forty-one to fifty-one months and a statutory maximum of ten years. Section 924(e)(2)(B)(ii) provides that a "violent felony" "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." In an opinion by Judge Harris Hartz, a divided Tenth Circuit panel affirmed the district court's ruling on the ground that the "otherwise" clause referred to all crimes, despite the enumeration of specific property offenses preceding the clause. In a concurring opinion, Judge Carlos Lucero joined in only a small portion of Judge Hartz's opinion affirming the application of the ACCA. The concurring opinion acknowledged the force of the dissent's argument, including the point that DWI may not have been among the offenses Congress contemplated when it enacted the "otherwise" clause.

Judge Michael McConnell wrote a well-reasoned dissent. Based on the language, purpose and legislative history of the ACCA and the "otherwise"

clause, and upon application of well-established canons of statutory construction, Judge McConnell concluded the "otherwise" clause included only offenses similar to the enumerated offenses, i.e., offenses involving active violence that are typical of career criminals and more dangerous when committed in conjunction with firearms. Consequently, Judge McConnell found DWI was not a "violent felony" under the ACCA.

A. The District Court Proceedings

Mr. Begay pleaded guilty to violating 18 U.S.C. § 922(g)(1) by possessing a firearm while being a felon. JA 1, 8-13. The maximum penalty for a violation of § 922(g)(1) is ten years' imprisonment. 18 U.S.C. § 924(a)(2). The presentence report determined Mr. Begay's recommended imprisonment range under the United States Sentencing Guidelines was forty-one to fifty-one months. JA 47.

The government objected that Mr. Begay should be sentenced under the ACCA based on his three prior recidivist DWI convictions. JA 14-20. The ACCA, as its name suggests, is "focused . . . on career offenders-those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Taylor v. United States*, 495 U.S. 575, 587-88 (1990). The ACCA increases the statutory range of imprisonment for § 922(g)(1) violations from zero to ten years, *see* 18 U.S.C. § 924(a)(2), to fifteen years to life, if the defendant has three prior convictions for a "serious drug offense" or a "violent felony." 18 U.S.C. § 924(e)(1). The government contended recidivist DWI is a "violent felony."

The government relied on § 924(e)(2)(B)(ii), which includes as a "violent felony" a crime that "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Ignoring the significance of the crimes listed before the "otherwise" clause, the government asserted that, because DWI creates a serious potential risk of physical injury to another, it fits the ACCA definition. JA 14-20, 27-32, 35-37, 57-59, 65. Due to application of the ACCA, a mandatory minimum sentence of fifteen years, and, under USSG § 4B1.4(b)(3)(A), a sentencing guideline range of 188 to 235 months applied, the government argued. JA 19.

At the sentencing hearing, the government submitted as exhibits copies of three New Mexico recidivist DWI judgments against Mr. Begay, one in 1998 and two in 2002. JA 26, 39-45. New Mexico treats first, second and third convictions under the DWI statute, N.M. Stat. § 66-8-102 (1978), as misdemeanors punishable by no more than 364 days in jail. N.M. Stat. § 66-8-102(E) & (F) (1978). In the judgments the government submitted, the state courts found Mr. Begay's convictions to be fourth or subsequent DWI convictions, activating a maximum possible punishment above one year. JA 39, 41-42, 43. *See* N.M. Stat. § 66-8-102(G) (1978) (upon a fourth or subsequent conviction the offender is guilty of a fourth degree felony); N.M. Stat. § 31-18-15(A)(6) (2001) (basic sentence for a fourth degree felony is eighteen months). The government offered no evidence that DWI, as a categorical matter, presents a serious potential risk of physical injury to another, but instead relied on case law. JA 14-20, 27-32, 35-37, 57-59, 65.

The elements of recidivist DWI in New Mexico are identical to the elements of a misdemeanor DWI. *State v. Anaya*, 933 P.2d 223, 229 (N.M. 1996). New Mexico DWI is a strict-liability offense. *State v. Rios*, 980 P.2d 1068, 1070 (N.M. Ct. App. 1999); *State v. Harrison*, 846 P.2d 1082, 1086-87 (N.M. Ct. App. 1992). If a person drives while under the influence of alcohol or with an alcohol concentration of .08 or more in his blood or breath, he or she has committed a "per se" violation. *Harrison*, 846 P.2d at 1087; N.M. Stat. § 66-8-102(A) (influence) & (C) (alcohol level) (1978). To establish the violation, the state must prove only that the accused exercised control of a motor vehicle while under the influence of alcohol or while his or her blood or breath contained a certain amount of alcohol. *Rios*, 980 P.2d at 1070. The state is not required to prove the defendant had any intent, such as the intent to drive. *Id.*; *Harrison*, 846 P.2d at 1087.

No dangerous conduct of any sort or any other traffic code transgression is required to establish DWI. Indeed, as long as the offender has physical control of the vehicle, the vehicle need not be moving or the engine running to constitute a violation of § 66-8-102. *State v. Johnson*, 15 P.3d 1233, 1235-38 (N.M. 2000); *Boone v. State*, 731 P.2d 366, 368-69 (N.M. 1986); N.M. Stat. § 66-1-4.4(K) (1978) (defining driver); UJI 14-4511 NMRA (defining operating a motor vehicle).

Mr. Begay disagreed with the government's ACCA contention. He argued that a proper reading of the "otherwise" clause in light of its textual context, statutory rules of construction and the legislative history of the ACCA establishes that DWI is not a "violent felony" because it is very unlike the other crimes listed before that clause, that is, burglary,

arson, extortion, and offenses involving use of explosives. JA 21-25, 32-35, 38. He also argued that: the government failed to meet its burden to prove DWI presents a serious potential risk of physical injury to others; the elements of DWI are not punishable in excess of a year; and a finding that DWI poses the requisite risk would violate the separation-of-powers doctrine. JA 22, 33, 54-55, 64-65.

The district court rejected Mr. Begay's arguments and accepted the government's argument that New Mexico recidivist DWI was a "violent felony." Accordingly, the court ruled Mr. Begay's three recidivist DWI convictions subjected him to the fifteen-year mandatory minimum sentence under the ACCA. JA 46-52, 66-67. *See* 18 U.S.C. § 924(e)(1). The court found the sentencing guideline range, as enhanced by virtue of the ACCA application, *see* USSG § 4B1.4(b)(3)(A), to be 188 to 235 months. JA 67. *See* USSG ch. 5. pt. A (Sentencing tbl.). The court imposed a sentence of 188 months—137 months above the top of the guideline range applicable absent the ACCA. JA 67, 70.

B. The Tenth Circuit Proceedings

Mr. Begay appealed his ACCA sentence to the Tenth Circuit. Mr. Begay's appeal presented the Tenth Circuit with a choice of two interpretations of § 924(e)(2)(B)(ii). Under the "all crimes" interpretation favored by the government, that provision covers any crime, regardless of its nature, that involves conduct presenting a serious risk of physical injury to another. Under the "similar crimes" interpretation Mr. Begay set out, the clause is limited to crimes of a nature similar to those enumerated before that clause—burglary, arson, extortion, and crimes using explosives—that is, property crimes

involving active violence that are typically committed by career criminals as a means of livelihood and that are more dangerous when committed with firearms.

The appeal prompted three opinions by the three-judge panel. A majority adopted the "all crimes" approach, holding recidivist DWI is a "violent felony" under the ACCA[1]. JA 81-99, 104. Judge Hartz asserted that the natural meaning of the phrase "conduct that presents a serious potential risk of physical injury" "certainly" includes DWI because "[m]any would say that the gravest risk to their physical safety from criminal misconduct is from drunk drivers." JA 91-92. He declined to read the phrase in light of the term defined—"violent felony"—or the title of the statute, the Armed Career Criminal Act. JA 92. He posited, at variance with the legislative history, that the "all crimes" interpretation served the purpose of imposing long terms of imprisonment on those who have displayed contempt for human life, which, in his opinion, included recidivist DWI offenders, not just those whose prior crimes would become more dangerous due to the possession of a firearm. JA 94. He found unhelpful the ACCA's legislative history and canons of statutory construction. JA 95-98.

Judge Lucero joined only in that part of Judge Hartz's opinion concerning the natural meaning of the "otherwise" clause. Judge Lucero believed the statute's language, in particular the word "otherwise," is so unambiguous it does not allow

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[1] The Tenth Circuit remanded for resentencing on the ground that the district court had misunderstood its discretion under *United States v. Booker*, 543 U.S. 220 (2005), to sentence at or above the mandatory minimum, but below the guideline range. JA 99-103.

consideration of the legislative history. He acknowledged dissenting Judge McConnell was "right to highlight the dramatic increase in sentence" Mr. Begay received as a result of the ACCA's application, and he agreed with Judge McConnell that DWI "may not have been in the minds of the 1986 amendment's sponsors when they drafted the residual language in § 924(e)(2)(B)(ii)." Nevertheless, Judge Lucero believed the statute's wording "clear[ly]" covered DWI. JA 104.

In dissent, Judge McConnell initially underscored the substantial difference between Mr. Begay's non-ACCA guideline range of forty-one to fifty-one months and Mr. Begay's ACCA sentence of more than fifteen years. JA 104-05. Judge McConnell found the statutory language was capable of either the "all crimes" or the "similar crimes" interpretation, but determined a number of factors relevant to statutory construction supported the latter interpretation. JA 109-121. Those factors were: the term "violent felony" that the "otherwise" clause defined; the purpose of the ACCA—to keep firearms out of the hands of those who commit serious crimes as a means of livelihood and whose crimes would be more dangerous if committed with firearms; the word "otherwise" connecting the residual clause to the preceding enumerated offenses; the well-established canons of statutory construction *noscitur a sociis* and *ejusdem generis*; the rule against rendering statutory language surplusage; the specific legislative history; and, if necessary, the rule of lenity. JA 110-21. Judge McConnell determined the ACCA's residual clause covers only those "violent, active" crimes, like burglary, arson, extortion, and use of explosives, that are "typical of career criminals, and which are more dangerous when committed in conjunction with

firearms." JA 119. Since DWI does not fit that description, he concluded recidivist DWI is not a "violent felony" under the ACCA. JA 121.

Mr. Begay filed a petition for rehearing en banc. Over Judge McConnell's dissent, the Tenth Circuit denied the petition. JA 122.

SUMMARY OF ARGUMENT

The district court applied to Mr. Begay the fifteen-year mandatory minimum sentence of the Armed Career Criminal Act ("ACCA"), based on Mr. Begay's prior state convictions for driving while intoxicated ("DWI")—a strict-liability, traffic offense that is, unless a recidivist enhancement applies, punished as a misdemeanor. That result is contrary to the language of the statute and far from what Congress intended when it enacted the ACCA in 1984 and amended it in 1986 to deter violent career criminals from possessing firearms.

The ACCA mandates a fifteen-year minimum sentence and raises the maximum sentence from ten years to life for violators of 18 § 922(g)(1) who have three prior convictions for a "violent felony." 18 U.S.C. § 924(e)(1). Section 924(e)(2)(B)(ii) provides that a "violent felony" "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Contrary to the Tenth Circuit's holding below, the "otherwise" clause definition of "violent felony" does not include recidivist DWI.

As its title suggests, the purpose of the Armed Career Criminal Act is to keep firearms out of the hands of "career offenders . . . who commit a large number of fairly serious crimes as their means of

livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Taylor*, 495 U.S. at 587-88. As this Court indicated in *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004), the term the "otherwise" clause defines—"violent felony"—calls to mind a category of violent, active crimes.

In light of the term "violent felony," the ACCA's purpose, the need to accord meaning to every word of a statute, including the word "otherwise," commonly accepted canons of statutory construction—*ejusdem generis* and *noscitur a sociis*—and this Court's comparative risk analysis in *James v. United States*, 127 S. Ct. 1586, 1594-96 (2007), the offenses included in the "otherwise" clause share with the enumerated offenses the following attributes: they must involve active violence; they must be property offenses that are typically committed by career criminals to provide a means of livelihood; they must become more dangerous when committed with a firearm; and they must have a *mens rea* requirement. New Mexico recidivist DWI satisfies none of these requirements. DWI does not involve active violence, as this Court found in *Leocal*; DWI is not a property offense; DWI is not a characteristic offense of career criminals; DWI does not become more dangerous if a firearm is present; and in New Mexico DWI has no *mens rea* requirement. Therefore, the "otherwise" clause does not include New Mexico recidivist DWI.

Mr. Begay's DWI convictions also are not for "violent felonies" because they are not for crimes "punishable by imprisonment for a term exceeding one year," under 18 U.S.C. § 924(e)(2)(B). While New Mexico punished Mr. Begay's convictions as felonies under a recidivist scheme, the elements of the offense are identical to the elements for DWI that New

Mexico punishes as a misdemeanor offense, absent prior DWI convictions. The "violent felony" definition focuses on the crime, not the characteristics of the individual offender. Under *Taylor*, *Shepard v. United States*, 544 U.S. 13, 17-18 (2005), and *James*, only the elements of the offense in the abstract, not an individual's criminal history, determine whether an offense is a "violent felony." Because the elements of New Mexico DWI do not call for punishment in excess of one year, it is not a "violent felony."

Even if the "otherwise" clause may include all crimes, the government cannot and did not prove the clause encompasses DWI, as defined in New Mexico, because DWI, as defined in New Mexico, does not present a serious potential risk of physical injury to another. The elements of the offense, which control the analysis under the categorical approach this Court employs—driving while under the influence of alcohol to the slightest degree or with a .08 blood or breath alcohol level—do not inherently involve conduct that creates any danger to anyone. Indeed, a person can commit DWI by merely exercising physical control of a nonmoving vehicle. Consequently, the "otherwise" clause does not include New Mexico DWI.

Finding the ACCA's "otherwise" clause includes DWI raises serious constitutional questions that warrant application of the constitutional avoidance doctrine. First, if read to include any crime that presents a "serious potential risk" of physical injury to another, the "otherwise" clause is too vague to afford fair warning that an offense such as DWI presents such a risk because it requires excessive speculation to arrive at that conclusion. Second, the "all-crimes" interpretation places the burden on the courts to make a quintessentially legislative

judgment to define and fix the penalty for categories of crimes. That is lawmaking that is the province of Congress, not the courts, in violation of the separation-of-powers doctrine. Third, the finding that DWI presents a serious potential risk of physical injury to another was made without any evidence having been presented in the district court and without any of the constitutional procedural requirements applicable to the resolution of facts that raise the statutory maximum sentence. To avoid these profound constitutional problems, this Court should adopt Mr. Begay's coherent, well-supported interpretation of the "otherwise" clause and hold that DWI is not a "violent felony."

Finally, at the very least, grave doubt exists that Congress intended the "otherwise" clause to include strict-liability, misdemeanor DWI. The rule of lenity requires this Court to resolve that doubt in favor of Mr. Begay.

Because Mr. Begay's DWI convictions were not for "violent felonies," the ACCA does not apply to him. This Court should reverse the Tenth Circuit's judgment affirming the ACCA's application to Mr. Begay.

ARGUMENT

I. RECIDIVIST DRIVING WHILE INTOXICATED, AS DEFINED UNDER NEW MEXICO LAW, IS NOT A "VIOLENT FELONY" UNDER THE "OTHERWISE" CLAUSE OF THE ARMED CAREER CRIMINAL ACT BECAUSE IT IS NOT A VIOLENT, ACTIVE PROPERTY CRIME THAT IS TYPICAL OF CAREER CRIMINALS AND THAT BECOMES MORE DANGEROUS WHEN COMMITTED WITH A FIREARM.

Congress passed the ACCA in 1984 and amended it in 1986 to single out for particularly severe punishment "career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Taylor v. United States*, 495 U.S. 575, 587-88 (1990). The ACCA requires the imposition of a minimum sentence of fifteen years and increases the maximum sentence from ten years, *see* 18 U.S.C. § 924(a)(2), to life imprisonment for certain defendants convicted of a violation of 18 U.S.C. § 922(g). 18 U.S.C. § 924(e)(1). Section 922(g) prohibits particular categories of people from possessing firearms. The dramatic ACCA enhancement applies to those § 922(g) defendants who have a total of three prior convictions for "serious drug offenses" or "violent felonies." 18 U.S.C. § 924(e).

Congress narrowly defined "violent felony" as a "crime punishable for a term exceeding one year" that fits within one of two classifications. Under § 924(e)(2)(B)(i), a crime is a "violent felony" when it "has as an element the use, attempted use, or threatened use of physical force against the person of another." Under § 924(e)(2)(B)(ii), a crime is a

"violent felony" when it "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

The question raised in this case is whether Congress intended the "otherwise" clause under § 924(e)(2)(B)(ii) to be read so broadly as to include recidivist DWI, as defined in New Mexico, or whether the clause includes only offenses that are like the enumerated offenses that precede it in that they are violent, active property crimes that are typically committed by career criminals as a means of livelihood and that are more dangerous when committed with firearms. The latter reading is the one that gives effect to every word of the clause and the statute, the one that accords with the understanding of the ACCA this Court expressed in *Taylor* and *James v. United States*, 127 S. Ct. 1586 (2007), the one that is consistent with the purpose and legislative history of the ACCA and the one supported by well-established canons of statutory construction. Driving while intoxicated in New Mexico is not a violent, active property crime that is typically committed by career criminals as a means of livelihood and that is more dangerous when committed with a firearm. Therefore, New Mexico DWI is not a "violent felony" under the ACCA.

A. The Term "Violent Felony," The Title, Purpose, And Structure Of The ACCA, And The Language Of The "Otherwise" Clause Limit That Clause To Violent, Active Property Crimes That Are Typical Of Career Criminals And That Are More Dangerous When Committed With Firearms.

The term the "otherwise" clause defines—"violent felony," the title of the ACCA—the "Armed Career Criminal Act," the purpose of the ACCA—to deter career criminals from possessing firearms, the structure of the ACCA, and the language of the "otherwise" clause all restrict the scope of that clause to offenses that are similar to the enumerated offenses of burglary, arson, extortion, and use of explosives, in that they are violent, active, property crimes that are typically committed by career criminals as their means of livelihood and made more dangerous when committed with a firearm.

1. "Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006); *see also Lopez v. Gonzales*, 127 S. Ct. 625, 631 (2006) (referring to "the cardinal rule that statutory language must be read in context") (quoting *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 596 (2004)). Thus, to determine whether the ACCA applies to DWI, this Court must "examine first the language of the governing statute, guided not by 'a single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy.'" *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (alteration in original) (quoting *Pilot Life Ins.*

Co. v. Dedeaux, 481 U.S. 41, 51 (1987) (quoting *Kelly v. Robinson*, 479 U.S. 36, 43 (1986))).

That the "otherwise" clause defines the term "violent felony" strongly points to the interpretation that the "otherwise" clause includes only violent, active crimes like burglary, arson, extortion, and crimes involving the use of explosives. Then Circuit Judge Stephen Breyer, speaking for the First Circuit, reached that conclusion in *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992). After opining that Congress did not intend the residual clause of the ACCA to include drunk driving, he stated: "we must read the ['otherwise' clause] definition in light of the term to be defined, 'violent felony,' which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." *Id.*

In *Leocal v. Ashcroft*, this Court took the same approach with respect to an almost identical term. In that case, this Court held that the residual clause definition of "crime of violence" under 18 U.S.C. § 16(b)—"any other [felony] that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"—does not encompass driving while intoxicated. 543 U.S. 1, 8-12 (2004). This Court observed: "In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Id.* at 11. The ordinary meaning of that term, combined with the emphasis of 18 U.S.C. § 16 on the use of physical force, "suggests a category of violent, active crimes that cannot be said naturally to include [driving under the influence] offenses," this Court explained. *Id.* As support for that determination, this Court cited then Circuit Judge Breyer's above-quoted observations in *Doe* regarding

the term applicable in this case—"violent felony." *Id.*; *see also Lopez*, 127 S. Ct. at 629-30 (rejecting the government's argument in part because of its argument's "incoherence with any commonsense conception of 'illicit trafficking,' the term ultimately being defined").

Because "violent felony" is the term the "otherwise" clause ultimately defines, the "otherwise" clause includes only offenses that involve active violence—a characteristic burglary, arson, extortion, and use of explosives share. *See Leocal*, 543 U.S. at 11; *Doe*, 960 F.2d at 225.

2. The title of the relevant legislation—the "Armed Career Criminal Act," Pub. L. No. 98-473, § 1801 98 Stat. 1837, 2185 (1984)—confirms that conclusion and that the "otherwise" clause offenses must be offenses ordinarily committed by career criminals that become more dangerous when committed with a firearm. The title of a statute is a "'tool[] available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (quoting *Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947)). In *Almendarez-Torres*, for example, the word "penalties" in the title of 8 U.S.C. § 1326 supported this Court's holding that Congress intended § 1326(b)(2) to set out a sentencing factor, not a separate criminal offense. *Id.* at 234-35. Likewise, in *INS v. National Ctr. for Immigrants' Rights*, 502 U.S. 183 (1991), this Court determined that, because the title of the statute in question referred to "unauthorized employment," the word "employment" in the text should be read as a reference solely to "unauthorized employment." *Id.* at 189; *see also FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 388-90 (1959) (title's reference to the purpose of the statute to protect consumers against false invoicing

indicated the invoice provisions were applicable to retail sales); *Maguire v. Commissioner*, 313 U.S. 1, 9 (1941) (the title "Property transmitted at death" suggested the interpreted provision was confined to the specific property the decedent owned at his death).

Similarly, the title of the Armed Career Criminal Act restricts the scope of the "otherwise" clause to serve the obvious intent of the Act, as the title proclaims—to keep firearms out of the hands of career criminals. As a Senate Report during the early stages of the Act's formation stated: "The title is meant to suggest that the Bill have limited scope in that it only deals with career criminals and only those career criminals . . . who are armed." *United States v. Brady*, 988 F.2d 664, 672 (6th Cir. 1993) (quoting S. Rep. No. 97-585, at 69 (1982)). Thus, the "otherwise" clause should be read to include only violent, active crimes which, like burglary, arson, extortion, and crimes involving explosives, are typical of career criminals, and which are more dangerous when committed in conjunction with firearms. *See* JA 119 (McConnell, J., dissenting).

3. The purpose of the ACCA, as explained in *Taylor*, evidences Congressional intent to limit the dramatic increases in punishment the Act prescribes to career criminals who commit crimes to further their livelihood that are more dangerous when committed with firearms. In *Taylor*, this Court analyzed the purpose of the ACCA in discerning the meaning of "burglary" in § 924(e)(2)(B)(ii). 495 U.S. at 581, 587-88. So also that purpose is instructive in determining the scope of the "otherwise"clause of § 924(e)(2)(B)(ii).

In *Taylor*, this Court pointed out Congress intended the Act to supplement the states' law enforcement efforts against "career" criminals—that "'very small

percentage of repeat offenders'" who commit a "'large percentage' of crimes of theft and violence." 495 U.S. at 581 (quoting H.R. Rep. No. 98-1073, at 1, 3 (1984)). This Court concluded that "throughout the history of the enhancement provision, Congress focused on career offenders-those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Id.* at 587-88. Because it is this group Congress singled out for especially severe punishment, the "otherwise" clause should encompass only those violent, active, property offenses ordinarily committed as a means of livelihood that become a powder keg when committed with a firearm.

4. The structure of § 924(e)(2)(B) supports the conclusion that the "otherwise" clause includes only property offenses. In that provision, Congress created two subcategories to define "violent felony." Subsection (i) includes only crimes against the person that have as an element the use, attempted use, or threatened use of physical force. Subsection (ii) includes only crimes against property, such as burglary, arson, extortion, and use of explosives, that present a serious potential risk of physical injury to another. *See United States v. Mathis*, 963 F.2d 399, 405 (D.C. Cir. 1992). That is how this Court viewed the structure of § 924(e)(2)(B) in *Taylor*. 495 U.S. at 584-85, 589 (describing the Congressional debate regarding what property crimes to include in subsection (ii)). Congress' logical classification of offenses under § 924(e)(2)(B) strongly indicates the "otherwise" clause under subsection (ii) includes only property crimes.

5. The term "violent felony," and the title, purpose, and structure of the ACCA inform the interpretation

of the language of § 3553(e)(2)(B)(ii)—"is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *See Dolan*, 546 U.S. at 486 (interpreting "a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute"). That language evidences a "substantive connection" between the "otherwise" clause and the enumerated offenses that precede it. The word "otherwise" refers the residual clause back to the listed offenses.

To read the "otherwise" clause without regard to the crime's relationship to burglary, arson, extortion, and use of explosives, as the majority of the Tenth Circuit did below, contravenes the well-established principle that every word of a statute must be given meaning if at all possible. *See Leocal*, 543 U.S. at 12. Such a reading leaves the word "otherwise" completely out of the residual clause. The word "or" alone would communicate that the residual clause refers to all crimes. JA 110-11 (McConnell, J., dissenting); *United States v. McCall*, 439 F.3d 967, 977 (8th Cir. 2006) (en banc) (Lay, J., dissenting). Indeed, the "all crimes" construction would eliminate the need for listing burglary, arson, extortion, and use of explosives, because those offenses present a serious potential risk of physical injury to another. *See James*, 127 S. Ct. at 1592. That construction would also render redundant Congress' references to "serious drug offenses" and offenses that involve the use of physical force against a person, because those offenses also create a serious potential risk of physical injury to another.

To be meaningful the word "otherwise" must connote a relationship of similarity between the

phrase that follows it and the enumerated offenses that precede it. On a number of occasions, this Court has interpreted "otherwise" to mean "similar" to other entities. For instance, this Court interpreted the phrase "otherwise qualified" in 29 U.S.C. § 794 to mean that the person is qualified for the position in the same way as non-disabled people are. *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979); *see also United States v. Mississippi*, 380 U.S. 128, 136-38 (1965) ("otherwise qualified" voters means voters who are as qualified as voters of a different race); *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U.S. 290, 295 (1902) (that a case may be brought by "certiorari or otherwise" means the manner of reaching the Court must be of the same kind as certiorari).

This Court in *James* engaged in an analysis in accord with the interpretation of the "otherwise" clause advanced here. To determine whether the "otherwise" clause included attempted burglary under Florida law, this Court compared the risks of physical injury associated with that offense to the physical injury risks associated with the enumerated offense of burglary. 127 S. Ct. at 1594-1596. "In the end," this Court's analysis "turn[ed]" on that risk comparison. *Id.* at 1599. This Court found the risks similar and, as a consequence, held the "otherwise" clause included Florida attempted burglary. *Id.* at 1594-1596.

The language and structure of § 924(e) establish that offenses encompassed by the "otherwise" clause must be similar to the enumerated offenses. Given the term "violent felony" that the "otherwise" clause defines, and the purpose, title, and structure of the ACCA, the "otherwise" clause offenses and the enumerated offenses must be similar in the following

respects: they must involve active violence; they must be typically committed by career criminals to pursue their livelihood; they must be property offenses; and they must become more dangerous when committed with firearms.

B. Well-Settled Canons Of Statutory Construction Establish The "Otherwise" Clause Offenses Must Be Similar To The Enumerated Offenses In That They Are Violent, Active, Property Crimes That Are Typical Of Career Criminals, And That Are More Dangerous When Committed With Firearms.

The time-honored statutory construction principles of *noscitur a sociis* and *ejusdem generis* counsel restriction of the offenses within the general "otherwise" clause of § 924(e)(2)(B)(ii) to offenses with the characteristics common to the specifically-enumerated crimes that precede it. Those principles come into play when a general phrase follows more specific words, as in § 924(e)(2)(B)(ii). As this Court said long ago, it is this Court's "duty to restrict the meaning of general words, whenever it is found necessary to do so, in order to carry out the legislative intention." *Reiche v. Smythe*, 80 U.S. 162, 164 (1871). The meaning of general words must be evaluated in light of the surrounding specific words "in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961).

Under *noscitur a sociis*, "a word is known by the company it keeps." *Id.* Words capable of many meanings may be understood by reference to their relationship with other associated words and phrases. *Id.* Under *ejusdem generis*, where general words follow specific words in a statute, the "general words

are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (internal quotation marks omitted) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001)). This principle has special force with respect to penal statutes. *Krugh v. Miehle Co.*, 503 F.2d 121, 125 (6th Cir. 1974).

The doctrines of *noscitur a sociis* and *ejusdem generis* apply to the interpretation of the "otherwise" clause of § 924(e)(2)(B)(ii). That clause is a general phrase that follows a list of specific, enumerated offenses and is tied to that list by the word "otherwise." Under *noscitur a sociis* and *ejusdem generis*, the "otherwise" clause includes only those offenses that "present[ ] a serious potential risk of injury" *and* share with the listed offenses common attributes germane to the term it defines—"violent felony"—and the purpose, title, and structure of the ACCA. Consequently, the "otherwise" clause encompasses only offenses that are like burglary, arson, extortion, and use of explosives in that: they involve active violence; they are typically committed by career criminals as a means of livelihood; they are property offenses; and they become more dangerous when committed with firearms. *See Guardianship Estate of Keffeler*, 537 U.S. at 382-86 (under *noscitur a sociis* and *ejusdem generis*, general term "other legal process" in phrase "execution, levy, attachment, garnishment, or other legal process" referred only to processes "much like" the processes of execution, levy, attachment, and garnishment, i.e., processes that use some judicial or quasi-judicial mechanism); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 114-15 (2001) (in light of *ejusdem generis* doctrine, "any

other class of workers engaged in foreign or interstate commerce" meant only transportation workers because the words "seamen" and "railroad employees" preceded the general phrase); *F.W. Fitch Co. v. United States*, 323 U.S. 582, 585-86 (1945) (in light of the *ejusdem generis* doctrine, "other charge" in the phrase "transportation, delivery, insurance, or other charge" included only shipment costs, not pre-shipment costs).

Application of the *noscitur a sociis* and *ejusdem generis* axioms to the "otherwise" clause obviates this Court's expressed concern in *James* about how to compare the risks of the enumerated offenses with the risks of "entirely unrelated unenumerated offenses." 127 S. Ct. at 1598. Those axioms eliminate the need for such a comparison.

In *James*, this Court effectively applied the *ejusdem generis* principle to the "otherwise" clause where the offense in question was related to an enumerated offense. It found the "most common relevant attribute" of the enumerated offenses is that they create a significant risk of bodily injury or confrontation that might result in bodily injury. *Id.* at 1592. It then held the "otherwise" clause included attempted burglary under Florida law because the risk of confrontation associated with that offense was similar to the confrontation risk associated with one of the enumerated offenses, i.e., burglary. *Id.* at 1594-96. This Court rejected the defendant's *ejusdem generis* argument that the "otherwise" clause offenses had to be completed offenses, *id.* at 1591-92, but did not address what characteristics, aside from risk of physical injury, that the "otherwise" clause offenses must share with the enumerated offenses.

The doctrines of *noscitur a sociis* and *ejusdem generis*, together with the language and structure of

§ 924(e), in particular of § 924(e)(2)(B)(ii), the term "violent felony" that the "otherwise" clause defines, and the title and purpose of the ACCA, answer that question. Together they establish that the offenses included in the "otherwise" clause, like burglary, arson, extortion, and crimes involving the use of explosives, involve active violence, are property crimes, are commonly committed by career criminals to further their livelihood, and become more dangerous when firearms are present.

C. The Legislative History Demonstrates Congress Intended The "Otherwise" Clause Offenses To Include Only Offenses That Are Violent, Active, Property Crimes That Are Typical Of Career Criminals, And That Are More Dangerous When Committed With Firearms.

A review of the legislative history of § 924(e)(2)(B)(ii) confirms the above analysis. Just as this Court's discussion of that history in *Taylor* shed light on the meaning of "burglary" in that provision, 495 U.S. at 581-90, so also that history illuminates how this Court should interpret the "otherwise" clause.

Congress enacted the first version of the ACCA in 1984. That version provided for the mandatory minimum sentence of fifteen years and maximum sentence of life for those § 922(g) offenders with three previous convictions for "robbery or burglary." *Id.* at 581. Congress selected those offenses because it believed those were the crimes most frequently committed by the career criminals it wished to deter from carrying firearms. *Id.*; H.R. Rep. No. 98-1073, at 1, 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3661-63.

In 1986, Congress amended the ACCA to its present form in the respects relevant to this case. Throughout the legislative process, Congress maintained "its general approach, in designating predicate offenses, of using uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof, and that are likely to be committed by career offenders." *Taylor*, 495 U.S. at 590. Congress expanded the predicate offenses that triggered the enhancement to include "serious drug offenses" and "violent felonies." During hearings on the proposed amendments, witnesses reiterated the concerns that prompted the original enactment of the ACCA: "the large proportion of crimes committed by a small number of career offenders, and the inadequacy of state prosecutorial resources to address this problem." *Id.* at 583 (citing *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. (1986) ("House Hearing"); *Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 99th Cong. (1986)).

Two different bills were originally proposed. Each "extend[ed] the range of predicate offenses to all crimes having certain common characteristics-the use or threatened use of force, or the risk that force would be used." *Id.* at 589. One defined the predicate crimes similar to the way 18 U.S.C. § 16 defines "crimes of violence." It included: (1) "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" and (2) any felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the

course of committing the offense." *Id.* at 583; S. 2312, 99th Cong. (1986); H.R. 4639, 99th Cong. (1986). The other bill included only the first "element" provision, which would have excluded burglary and arson. *Taylor*, 495 U.S. at 583; H.R. 4768, 99th Cong. (1986).

Some witnesses and Congress members criticized the narrower bill because it excluded property crimes, pointing out that property crimes such as burglary, arson, extortion, and explosive offenses were inherently dangerous due to the likelihood of confrontation with residents or law enforcement officers, although those offenses did not have use of force as an element. *Taylor*, 495 U.S. at 584-85 (citing House Hearing at 9, 12, 15, 49-53). As an example, this Court related the testimony of one witness who said: "Now the question has been raised, well, what crimes against *property* should be included? We think, burglary, of course; arson; extortion; and various explosives offenses . . . . It is these crimes against *property*-which are inherently dangerous-that we think should be considered as predicate offenses." *Id.* at 585 (quoting House Hearing at 15) (emphases added). Others considered the broader bill to be too broad, noting the need to prioritize offenses. *Id.* at 586 (citing House Hearing at 11, 16).

Congress agreed to address crimes against people in what became subsection (i) of § 924(e)(2)(B). The debate on the bills "centered upon whether any *property* crimes should be included" in a second subsection, "and if so, which ones." *Id.* at 589 (emphasis added). A consensus developed that certain "*property* crimes-namely burglary, arson, extortion, and the use of explosives-so often presented a risk of injury to persons, or were so often committed by

career criminals, that they should be included in the enhancement statute." *Id.* at 597 (emphasis added).

The House of Representatives report on the legislation summarized the intent of the final version of the ACCA amendments:

> The other major question involved in these hearings was as to what violent felonies involving physical force against *property* should be included in the definition of 'violent' felony. The Subcommittee agreed to add the crimes punishable for a term exceeding one year that involve conduct that presents a serious risk of physical injury to others. This will add State and Federal crimes against *property* such as burglary, arson, extortion, use of explosives and *similar crimes* as predicate offenses where the conduct involved presents a serious risk of injury to a person.

Id. at 587 (quoting H.R. Rep. No. 99-849, at 3 (1986)) (first emphasis in original, other emphases added).

Thus, Congress intended to include in the "otherwise" clause "property" offenses that were "similar" to burglary, arson, extortion, and use of explosives. The legislative history—replete with expressed concern for the eruption of violence during a firearm-wielding offender's commission of a property crime as a means of criminal livelihood—demonstrates the "otherwise" clause offenses and the enumerated offenses share the following features: they involve active violence; they are property offenses; they are typically committed by career criminals to maintain a criminal livelihood; and they become more dangerous when committed with firearms. *See Taylor*, 495 U.S. at 581-90.

D. DWI, As Defined Under New Mexico Law, Is Not A Violent, Active, Property Crime That Is Typical Of Career Criminals And That Is More Dangerous When Committed With Firearms And Therefore It Is Not A "Violent Felony" Under The ACCA.

The "otherwise" clause of § 924(e)(2)(B)(ii) does not encompass the strict-liability traffic offense of DWI, as defined under New Mexico law, because that offense is not a violent, active, property offense that is typically committed by career criminals to maintain a criminal livelihood and that becomes more dangerous when committed with a firearm. When assessing whether the "otherwise" clause includes a particular offense, courts must employ the "categorical approach." *James*, 127 S. Ct. at 1593. Under that approach, courts "'look only to the fact of conviction and the statutory definition of the prior offense,'" and do not generally consider the "particular facts disclosed by the record of conviction." *Shepard v. United States*, 544 U.S. 13, 17 (2005) (quoting *Taylor*, 495 U.S. at 602). In other words, courts "consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender." *James*, 127 S. Ct. at 1594 (emphasis in original).

The three convictions of Mr. Begay that triggered the district court's application of the ACCA were DWI convictions under N.M. Stat. § 66-8-102. JA 39-45. The record in this case does not indicate precisely

under what subsection Mr. Begay was convicted. The relevant subsections are § 66-8-102(A) and (C)[2].

Section 66-8-102(A) provides that "[i]t is unlawful for a person who is under the influence of intoxicating liquor to drive" a vehicle. The elements of that offense include: (1) the defendant operated a motor vehicle; and (2) at that time, the defendant was under the influence of intoxicating liquor, that is, as a result of drinking liquor the defendant "'was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to [the driver] and the public.'" *State v. Sanchez*, 36 P.3d 446, 449 (N.M. Ct. App. 2001) (quoting UJI 14-4501 NMRA); *see also State v. Deming*, 344 P.2d 481, 484-85 (N.M. 1959).

Section 66-8-102(C) provides that "[i]t is unlawful for a person who has an alcohol concentration of eight one hundredths or more in his blood or breath to drive" a vehicle. The critical element of § 66-8-102(C) is that at the time of the operation of the vehicle the defendant must have an alcohol concentration of eight one-hundredths grams or more in 100 milliliters of blood or 210 liters of breath. UJI 14-4503 NMRA.

Driving while intoxicated in New Mexico is a strict-liability offense. *State v. Rios*, 980 P.2d 1068, 1070 (N.M. Ct. App. 1999); *State v. Harrison*, 846 P.2d

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[2] Section 66-8-102(B) involves driving while under the influence of drugs. That provision is not relevant because at least one of Mr. Begay's three convictions was clearly not for drug impairment, JA 39-40, and this Court, in assessing whether an offense is a "violent felony," must examine how an offense is committed "in the ordinary case." *James*, 127 S. Ct. at 1597.

1082, 1086-87 (N.M. Ct. App. 1992). To establish DWI, the state need only prove the accused exercised control of a motor vehicle while under the influence of alcohol or while his or her blood or breath contained a certain amount of alcohol. *Rios*, 980 P.2d at 1070. That conduct is a "per se" violation. *Harrison*, 846 P.2d at 1087. The state is not required to prove the defendant had any intent, such as the intent to drive. *Rios*, 980 P.2d at 1070; *Harrison*, 846 P.2d at 1087.

No dangerous conduct of any sort or any other traffic code transgression is required to establish a violation of § 66-8-102(A) or (C). In fact, a person can violate § 66-8-102 as long as he or she has physical control of the vehicle, even when the vehicle is not moving and its engine is not running. *State v. Johnson*, 15 P.3d 1233, 1235-38 (N.M. 2000); *Boone v. State*, 731 P.2d 366, 368-69 (N.M. 1986); N.M. Stat. § 66-1-4.4(K) (1978) (defining driver); UJI 14-4511 NMRA (defining operating a motor vehicle). This is true even when the driver is parked on private property. *Johnson*, 15 P.3d 1233.

New Mexico treats first, second, and third violations of § 66-8-102(A) or (C) as misdemeanors punishable by no more than 364 days in jail. N.M. Stat. § 66-8-102(E) & (F) (1978). Upon a fourth or subsequent conviction under § 66-8-102, an offender is guilty of a fourth degree felony with a basic sentence of 18 months under N.M. Stat. § 66-8-102(G) (1978). *See* N.M. Stat. § 31-18-15(A)(6) (2001) (18 months is the basic sentence for a fourth degree felony). Mr. Begay's violations of § 66-8-102 became punishable as felonies due to application of that recidivist provision.

The elements of DWI punishable as a felony are identical to the elements of a misdemeanor DWI. *State v. Anaya*, 933 P.2d 223, 229 (N.M. 1996). By

punishing a DWI as a felony, the New Mexico legislature did not intend to change the nature of the offense, but merely to increase the punishment for DWI recidivists. *Id.* at 228. Under New Mexico law, a DWI punishable as a felony, unlike all non-DWI felonies, is not a felony for habitual offender purposes. *State v. Begay*, 17 P.3d 434, 435-37 (N.M. 2001).

Driving while intoxicated, as defined in New Mexico, is not a violent, active, property crime ordinarily committed as a means of criminal livelihood that becomes more dangerous when committed with a firearm. First, it is not a violent, active crime. In *Leocal*, this Court found that accidental, negligent drunk driving does not fit in the category of violent, active crimes. 543 U.S. at 11. Then Circuit Judge Breyer, speaking for the First Circuit, in support of the holding that firearm possession is not a "violent felony" under the ACCA, opined that a contrary holding would bring within the ACCA's scope other crimes that "do not seem to belong there," such as "drunken driving." *Doe*, 960 F.2d at 225. Judge Breyer explained that the term "violent felony" "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence" than does DWI. *Id.* A DWI offender in New Mexico, who need not have any intent of any kind or any awareness of the possibility of a confrontation or a risk of physical injury, is not the violent, active offender Congress had in mind when it enacted the ACCA and, in particular, the "otherwise" clause. JA 110-21 (McConnell, J., dissenting). *Cf.* N.M. Stat. § 33-2-34(L) (1978) (not including DWI as a "serious violent felony" for good time credit purposes).

Second, DWI is not a property crime. It is a traffic offense, the elements of which are completely unrelated to property. Third, obviously, DWI is not the kind of offense career criminals commit to pursue their livelihood. DWI is unlike burglary, arson, extortion, or the use of explosives, which are typically committed for pecuniary gain. One cannot make a career out of driving while intoxicated. *See United States v. Rutherford*, 54 F.3d 370, 377, n.19 (7th Cir. 1995) ("'it is doubtful that one can make a career out of recklessness'") (quoting *United States v. Parson*, 955 F.2d 858, 874 (3d Cir. 1992)).

Fourth, DWI does not become any more risky when accompanied by a firearm. Indeed, unlike those who commit the enumerated crimes, a DWI offender cannot use a firearm during the commission of the offense. DWI does not provoke the risk of violent confrontation the enumerated crimes occasion. Whatever risks of physical injury are involved with DWI are unrelated to the presence of firearms. JA 111-12 (McConnell, J., dissenting); *see also McCall*, 439 F.3d at 983 (Lay, J., dissenting) (a repeat drunk driver's threat to society "is not intensified by possession of a gun").

Because DWI under New Mexico law is not a violent, active, property crime, is not ordinarily committed as a means of criminal livelihood, and does not pose an elevated risk of injury when committed with a firearm, DWI is not a "violent felony" within the purview of the "otherwise" clause. As would be true if DWI were deemed a "crime of violence" under 18 U.S.C. § 16(b), so also deeming DWI a "violent felony" "would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Leocal*, 543 U.S. at 11. While "drunk driving

is a nationwide problem, ... this fact does not warrant . . . shoehorning it into statutory sections where it does not fit." *Id.* at 13. DWI does not fit within the "otherwise" clause of the ACCA. Mr. Begay's DWI convictions were not for "violent felonies." The ACCA does not apply to Mr. Begay.

II. RECIDIVIST DRIVING WHILE INTOXICATED, AS DEFINED UNDER NEW MEXICO LAW, IS NOT A "VIOLENT FELONY" UNDER THE "OTHERWISE" CLAUSE OF THE ARMED CAREER CRIMINAL ACT BECAUSE IT HAS NO *MENS REA* ELEMENT.

In light of the compelling interpretative arguments under point I and the longstanding presumption in favor of employing a *mens rea* requirement in criminal statutes that impose harsh punishment, the ACCA's "otherwise" clause includes only offenses that, like the enumerated offenses, have a *mens rea* element. DWI under New Mexico law has no such element. Therefore, the "otherwise" clause does not include DWI, as defined in New Mexico.

1. Because the requirement of *mens rea* is a bedrock principle of Anglo-American criminal jurisprudence, offenses with no *mens rea* requirements are disfavored. *Staples v. United States*, 511 U.S. 600, 605-06 (1994). As a result, "some indication of Congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Id.* at 606. This is especially true when the offense is a felony and the punishment is harsh. *Id.* at 616-19. The presumption against strict liability applies to the interpretation of sentence enhancement statutes as well as statutes defining offenses. *United States v. Brown*, 449 F.3d 154, 157 (D.C. Cir. 2006).

The presumption in favor of a *mens rea* requirement applies here. The ACCA mandates such a severe enhancement that Congress must be presumed to require ACCA predicate offenses that are governed by the "otherwise" clause to have a *mens rea* element.

2. The language, structure, purpose, and legislative history of the ACCA confirm the appropriateness of imposing a *mens rea* requirement here. As demonstrated above, the "otherwise" clause encompasses only offenses similar to the enumerated offenses. All four of the enumerated offenses have a *mens rea* requirement. Burglary includes an intent to commit a crime. *Taylor*, 495 U.S. at 599. Arson is the wilful and malicious burning of property. *United States v. Hathaway*, 949 F.2d 609, 610 (2d Cir. 1991) (per curiam). Extortion involves the intentional use of force or threats to obtain something of value. *James*, 127 S. Ct. at 1604-06 (Scalia, J., dissenting); *United States v. Unthank*, 109 F.3d 1205, 1209-10 (7th Cir. 1997). "Use" of explosives "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *See Leocal*, 543 U.S. at 9. Like the enumerated offenses, the "otherwise" clause offenses must have a *mens rea* element.

A *mens rea* requirement serves Congress' purpose in enacting the ACCA and, in particular, the residual provision of § 924(e)(2)(B)(ii)—to severely punish "career offenders . . . who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons," *Taylor*, 495 U.S. at 587-88. Building a "career" from accidental crimes is not possible. A person acting with no particular purpose in mind does not present an increased threat to others due to possession of a

firearm. As this Court pointed out in *Taylor*, a burglar's awareness of the possibility of a violent confrontation between the burglar and someone who might try to interfere with the burglary "may mean that he is prepared to use violence if necessary to carry out his plans or to escape." *Id.* at 588. By contrast, a strict-liability offender has no goal that a third party could thwart and thus no awareness of the possibility of a violent confrontation or desire to provoke one.

Treating offenses with no *mens rea* as offenses within the "otherwise" clause is inconsistent with the *mens rea* presumption and the language, structure, purpose, and legislative history of the ACCA and the "otherwise" clause. *See United States v. Parson*, 955 F.2d 858, 874 (3d Cir. 1992) (suggesting the "otherwise" clause of § 924(e)(2)(B)(ii) does not include offenses, such as DWI, that have no element of intent to do harm, and expressing concern that an interpretation of the "otherwise" clause of the career offender sentencing guidelines, USSG § 4B1.2, cmt., n.1, to include such offenses results in unfairness); *Rutherford*, 54 F.3d at 377 (expressing the same concern). *Cf.* 42 U.S.C. § 13701(2) (including in the definition of "violent crime" under the truth-in-sentencing grant program only offenses with a *mens rea* more egregious than negligence, for example, "nonnegligent manslaughter").

3. As discussed under point I, New Mexico DWI has no *mens rea* element. It is a strict-liability offense. *Rios*, 980 P.2d at 1070; *Harrison*, 846 P.2d at 1086-87. Since the "otherwise" clause does not include offenses without a *mens rea* requirement, the "otherwise" clause does not include New Mexico DWI. *See Leocal*, 543 U.S. at 11, 13 (DWI is not a "crime of violence" as defined by 18 U.S.C. § 16(b) because DWI

may be committed negligently or accidentally). Mr. Begay's DWI convictions are therefore not for "violent felonies." The ACCA does not apply to Mr. Begay.

III. RECIDIVIST DRIVING WHILE INTOXICATED, AS DEFINED UNDER NEW MEXICO LAW, IS NOT A "VIOLENT FELONY" UNDER THE "OTHERWISE" CLAUSE OF THE ARMED CAREER CRIMINAL ACT BECAUSE, BASED SOLELY ON ITS ELEMENTS, IT IS "NOT PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR."

The "otherwise" clause does not include DWI that New Mexico punishes as a felony because the elements of that offense are the same as the elements of misdemeanor DWI, which is not punishable by imprisonment for more than a year. Under 18 U.S.C. § 924(e)(2)(B), to qualify as a "violent felony," an offense must be " punishable by imprisonment for a term exceeding one year." The definition of "violent felony" under that provision focuses on the offense, not on the characteristics of the offender that may increase the DWI punishment to a felony level. The mandated categorical approach requires consideration solely of the elements of the offense and prohibits consideration of the offender's particular circumstances. Looking solely at the elements of a New Mexico recidivist DWI offense, that offense is not punishable by a term of imprisonment exceeding a year under § 924(e)(2)(B) and is therefore not a "violent felony."

1. DWI is ordinarily a misdemeanor under New Mexico law punishable by less than a year of imprisonment. N.M. Stat. § 66-8-102(E) & (F) (1978). The nature of a DWI conviction in New Mexico does not change when it is punished as a felony with a

maximum possible sentence above a year, due to the defendant's prior DWI convictions. *Anaya*, 933 P.2d at 228. The elements of a DWI punished as a felony are identical to the elements of a misdemeanor DWI. *Id.* at 229. In sum, the crime itself is the same regardless of the defendant's individual criminal history.

For that reason, DWI punished as a felony in New Mexico is not a "crime punishable by imprisonment for a term exceeding one year" that "is burglary, arson, or extortion or involves conduct that presents a serious potential risk of physical injury to another" under § 924(e)(2)(B). The focus of the quoted language is on the "crime," not the offender. As this Court has said, "recidivism 'does not relate to the commission of the offense' itself." *Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000) (quoting *Almendarez-Torres*, 523 U.S. at 230, 244). The crime of DWI in New Mexico, properly viewed without regard to the offender's criminal record, is not punishable by more than a year of imprisonment. *See* N.M. Stat. § 66-8-102(E) (1978).

2. To consider a defendant's particular circumstances to determine the felony nature of the crime would contradict the required categorical approach to the ACCA. Under the categorical approach, this Court looks "only to the fact of conviction and the statutory definition of the prior offense,'" and does not generally consider the "particular facts disclosed by the record of conviction." *Shepard*, 544 U.S. at 17 (quoting *Taylor*, 495 U.S. at 602). This Court considers "whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender." *James*, 127 S. Ct. at 1594 (emphasis in original). In New Mexico,

the elements of DWI constitute a misdemeanor offense punishable by less than a year of incarceration. *Anaya*, 933 P.2d at 228; N.M. Stat. § 66-8-102(E) (1978).

3. The language of the "otherwise" clause also suggests recidivist DWI should not be treated as a felony under the ACCA. The "otherwise" clause speaks in terms of the risk of physical injury to another. *See* 18 U.S.C. § 924(e)(2)(B)(ii). The crime of DWI, as defined by its elements, does not become any more dangerous as a result of the offender's prior convictions because the elements are the same regardless of the offender's criminal history. *See Anaya*, 933 P.2d at 229. Thus, triggering application of the "otherwise" clause solely based on the accumulation of prior convictions does not make sense.

4. Given the harshness of the punishment under the ACCA and the purpose of the ACCA to keep firearms from the possession of hardened criminals who have committed "fairly serious" offenses, *Taylor*, 495 U.S. at 587-88, Congress did not intend to apply the ACCA to those who committed offenses which the relevant jurisdictions do not regard as serious enough to warrant designations as felonies. This is particularly true with respect to DWI in New Mexico where DWIs punished as felonies, unlike all non-DWI felonies, are not considered felonies for habitual offender purposes. *Begay*, 17 P.3d at 435-37. It would be ironic indeed if the federal ACCA counted New Mexico DWIs as predicate felonies, when New Mexico does not.

5. The Ninth Circuit's decision in *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), *superceded on other grounds by statute, as recognized in United States v. Narvaez-Gomez*, 489

F.3d 970, 977 (9th Cir. 2007), supports Mr. Begay's position. In that case, the defendant had been convicted of a theft offense and sentenced to two years of imprisonment pursuant to a recidivist statute. *Id.* at 1208. Absent the recidivist enhancement, the maximum penalty for defendant's offense would have been six months. *Id.* The Ninth Circuit held the prior offense was not an offense "for which the term of imprisonment [is] at least one year," as required by 8 U.S.C. § 1101(a)(43)(G) in order to constitute an aggravated felony. *Id.* at 1208-11. The court reasoned that the categorical approach this Court mandates precluded consideration of the particular facts of the defendant's prior criminal history. *Id.* at 1208-09. Instead, the court could only consider the maximum sentence available for the crime itself—an approach congruent with this Court's historic separation of recidivism provisions and substantive crimes. *Id.* at 1209.

In *United States v. Rodriguez*, 464 F.3d 1072 (9th Cir. 2006), the Ninth Circuit followed its holding in *Corona Sanchez* when it interpreted the ACCA. The court held that, in determining whether a drug offense has a maximum term of imprisonment of ten years or more for purposes of qualifying as a predicate "serious drug felony" under the ACCA, it would consider the punishment that was available without application of the state's recidivist statute. *Id.* at 1079-82. This Court granted certiorari to review that decision this term. *United States v. Rodriguez*, ___ S. Ct. ___, 2007 WL 1700499 (Sept. 25, 2007) (No. 06-1646).

6. For the reasons stated above, this Court must only consider the elements constituting the crime of DWI in New Mexico to determine if Mr. Begay's convictions for DWI were for "violent felonies." That

his prior DWI convictions led to the availability of felony punishment is irrelevant. The elements of DWI constitute a misdemeanor not punishable by a sentence exceeding one year. Therefore, Mr. Begay's recidivist DWI convictions are not for "violent felonies." The ACCA does not apply to Mr. Begay.

IV. RECIDIVIST DRIVING WHILE INTOXICATED, AS DEFINED UNDER NEW MEXICO LAW, IS NOT A "VIOLENT FELONY" UNDER THE "OTHERWISE" CLAUSE OF THE ARMED CAREER CRIMINAL ACT BECAUSE IT DOES NOT INVOLVE CONDUCT THAT PRESENTS A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY TO ANOTHER.

Even assuming arguendo that the "otherwise" clause may include all crimes with the requisite risk of injury, the government has not and cannot meet its burden to prove the clause encompasses DWI, as defined in New Mexico, because DWI, as defined in New Mexico, does not present a serious potential risk of physical injury to another. The elements of the offense in themselves do not require any conduct that presents any danger. They present only a possibility that risky behavior might follow. Consequently, the government cannot meet its burden to prove DWI satisfies the prerequisites for inclusion in the "otherwise" clause of § 924(e)(2)(B)(ii).

1. The government bears the burden to prove the ACCA applies to a particular defendant. *United States v. Amos*, ___ F.3d ___, No. 06-5032, 2007 WL 2262852, at *1 (6th Cir. Aug. 9, 2007); *United States v. Thomas*, 159 F.3d 296, 300 (7th Cir. 1998). In this case, the government bears the burden of proving DWI, as defined under New Mexico law, "presents a serious potential risk of physical injury to another."

That burden is a heavy one. While this Court opined in *James*, 127 S. Ct. at 1597, that the phrase "potential risk" suggested "Congress intended to encompass possibilities even more contingent or remote than a simple 'risk,'" the word "serious" that precedes that phrase must be given significance as well. *Leocal*, 543 U.S. at 12 (every word of a statute should have a meaning if at all possible). "Serious" means weighty, important, grave, considerable. *Oxford English Dictionary*, *available at* http://dictionary.oed.com (search "serious"; then follow "find word" hyperlink); *Black's Law Dictionary* 1371 (7th ed. 1999); *United States v. Two Eagle*, 318 F.3d 785, 791 (8th Cir. 2003) ("'serious bodily injury'" is of a "grave" nature); *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997) ("serious" medical condition is an injury that a reasonable doctor or patient would find important).

2. New Mexico DWI does not present a weighty, important, grave, considerable potential risk of physical injury to another. Under the mandated categorical approach, only the elements of the offense matter in making that risk determination. *James*, 127 S. Ct. at 1593-94. A person violates N.M. Stat. § 66-8-102(A) by driving under the influence of intoxicating liquor to the "'slightest degree.'" *Sanchez*, 36 P.3d at 449 (quoting UJI 14-4501 NMRA). Section 66-8-102(C) does not require any impairment at all. Exercising control of a motor vehicle with a .08 blood or breath alcohol level is a "per se" violation. *Rios*, 980 P.2d at 1070; *Harrison*, 846 P.2d at 1087. No injury-threatening conduct of any sort or any other traffic code breach is necessary to constitute a violation of § 66-8-102. In fact, a person can be guilty of DWI while safely parked on private property. *See Johnson*, 15 P.3d 1233; *Boone*, 731 P.2d at 368-69.

Because the elements of DWI lack any conduct component that creates any particular danger to anyone, DWI does not present a serious potential risk of physical injury to another. DWI in New Mexico contrasts sharply with, for example, the enumerated offense of burglary. A burglar enters another's home or business with the intent to commit a felony. *Taylor*, 495 U.S. at 599. Such conduct invites a violent confrontation with anyone who happens to discover the burglar, such as an "occupant, caretaker, or some other person who comes to investigate." *Id.* at 588. On the other hand, a DWI offender drives on a road or sits in a driveway impaired to the slightest degree or with a certain blood or breath level of alcohol. *Sanchez*, 36 P.3d at 449; *Rios*, 980 P.2d at 1070; *Harrison*, 846 P.2d at 1087. The offender does not provoke a violent confrontation or act in a way that creates a risk of injury to anyone. The offender might eventually engage in conduct that is dangerous, but that conduct is not an element of the offense.

3. For these reasons, the government cannot meet its burden to prove DWI, as defined under New Mexico law, "presents a serious potential risk of physical injury to another[3]." *See Thomas*, 159 F.3d at 299-300 (government did not submit evidence sufficient to meet its burden to prove statutory rape of a 16 year old presents a serious potential risk of physical injury). Therefore, Mr. Begay's New Mexico

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[3] The National Association of Criminal Defense Lawyers will be filing an amicus curiae brief explaining that a statistical analysis of the chances of a single drunk driving episode leading to physical injury demonstrates the risk of physical injury associated with DWI is not a "serious potential risk" under the "otherwise" clause.

DWI convictions are not for "violent felonies." The ACCA does not apply to Mr. Begay.

V. THE CONSTITUTIONAL AVOIDANCE DOCTRINE AND THE RULE OF LENITY PROHIBIT THE INCLUSION OF RECIDIVIST DWI, AS DEFINED UNDER NEW MEXICO LAW, IN THE ACCA'S "OTHERWISE" CLAUSE.

The constitutional avoidance doctrine and the rule of lenity require resolving the interpretation of the "otherwise" clause in Mr. Begay's favor. A determination that the "otherwise" clause includes DWI, as defined under New Mexico law, raises serious constitutional questions, which the "similar crimes" interpretation would avoid. Given the strong arguments Mr. Begay has presented above, at the very least a grave doubt exists that the "otherwise" clause includes New Mexico recidivist DWI. Accordingly, the constitutional avoidance doctrine and the rule of lenity apply. The "otherwise" clause must be read to exclude New Mexico recidivist DWI.

A. The Constitutional Avoidance Doctrine Prohibits Inclusion Of Recidivist DWI, As Defined Under New Mexico Law, In The ACCA's "Otherwise" Clause.

Because the courts below adopted the "all crimes" interpretation of the ACCA's "otherwise" clause, they were forced to answer the factual and policy question whether DWI "presents a serious potential risk of physical injury to another." Their affirmative answer raises grave constitutional questions. First, if read to include any crime that presents a "serious" "potential" "risk" of injury, the "otherwise" clause is too vague to afford fair warning of what offenses satisfy those criteria. Second, that reading requires

the Judiciary, in violation of the separation-of-powers doctrine, to define and fix the penalty for categories of crimes, i.e., to make a legislative judgment reserved for Congress, not the courts. Third, the finding that DWI presents a serious potential risk of physical injury to another without any evidence being presented on that matter before the district court and without being afforded any of the constitutional procedural rights applicable to the resolution of facts that raise the statutory maximum sentence, deprived Mr. Begay of his Fifth and Sixth Amendment rights. To avoid these serious constitutional issues, this Court should adopt the coherent, well-supported interpretation of the "otherwise" clause Mr. Begay advances and find the "otherwise" clause does not include DWI.

1. "'[I]t is a cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (alteration in original) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales v. Carhart*, 127 S. Ct. 1610, 1631 (2007) (quotation marks and citation omitted). Consequently, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided [this Court's] duty is to adopt the latter." *Jones v. United States*, 526 U.S. 227, 239 (1999).

2. Finding DWI presents a serious potential risk of physical injury to another under the "otherwise" clause raises "grave and doubtful constitutional

questions." First, under the "all crimes" interpretation of the "otherwise" clause, the clause is too vague to afford fair warning of what crimes it includes because persons of "common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Adrift from any requirement of a relationship between the "otherwise" clause offenses and the enumerated offenses, that interpretation necessitates boundless judicial speculation to reach a conclusion as to what crimes the "otherwise" clause covers.

The "void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). "[V]ague sentencing provisions may [pose] constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States v. Batchelder*, 442 U.S. 114, 123 (1979). "A criminal statute must be definite and certain in respect to the punishment it is intended to impose." *Smith v. United States*, 145 F.2d 643, 644 (10th Cir. 1944).

In this case, a determination that DWI "presents a serious potential risk of physical injury to another," within the meaning Congress intended, would rely solely on conjecture or a gut feeling as to the risks involved in drunk driving and the degree of risk Congress wanted the "otherwise" clause to cover. The Tenth Circuit's decision below is powerful evidence of

the accuracy of that contention. As sole support for its determination that DWI met the "otherwise" clause risk requirement, the court surmised: "[m]any would say that the gravest risk to their physical safety from criminal misconduct is from drunken drivers." JA 91-92. Under the "all crimes" interpretation, the Tenth Circuit made "speculation law," *see United States v. Evans*, 333 U.S. 483, 495 (1948), which could hardly give fair notice to a person of ordinary intelligence that ACCA's severe penalty would apply to prior DWI offenses.

As Judge Ann Williams of the Seventh Circuit said in dissenting from the application of the "all crimes" interpretation to find the "otherwise" clause included failure to report to jail:

> All crimes carry the *possibility* of violent confrontation-even the feeblest episode of shoplifting . . . It seems unlikely, however, that Congress would have gone to the trouble of delimiting the reach of section 924 to "violent felonies" if it intended to subject even this crime to enhanced punishment for recidivism. Moreover, if Congress intended for the courts to examine the risk of physical injury in the abstract, it could have simply instructed the courts that "violent felonies" are all those involving "conduct that presents a serious potential risk of physical injury to another," but it did not . . . . By extending our violent felony jurisprudence to crimes such as failure to report to jail, we run the risk of compromising the [principle that] "**a fair warning should be given to the world in language that the common world will understand.**"

United States v. Golden, 466 F.3d 612, 617-18 (7th Cir. 2006) (Williams, J., dissenting) (emphases in

original) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)), *petition for cert. filed*, (U.S. Apr. 9, 2007) (No. 06-10751); *see also United States v. Chambers*, 473 F.3d 724, 726 (7th Cir. 2007), (regarding application of the "otherwise" clause to every escape, "it is an embarrassment to the law when judges base decisions of consequence on conjectures, in this case a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses"), *petition for cert. filed*, (U.S. May 8, 2007) (No. 06-11206). Thus, ruling that DWI is a "violent felony" implicates the void-for-vagueness doctrine.

That conclusion is consistent with this Court's decision in *James*. In the course of holding that Florida attempted burglary satisfied the "otherwise" clause, this Court opined in *James* that that clause was not unconstitutionally vague. 127 S. Ct. at 1598, n.6. In that case, however, this Court could readily compare the risks of attempted burglary to a closely-related analog—burglary. As Justice Scalia pointed out in his dissent, DWI has no such analog. *Id.* at 1601 (Scalia, J., dissenting). As a result, this Court is left with no basis for comparison, only an indefinite notion of what "serious potential risk" could possibly mean and, with neither legislative findings nor properly admitted empirical evidence, no information as to how risky DWI is. This Court acknowledged in *James* that, without hard statistics, it could not compare the risk posed by an entirely unrelated unenumerated offense to the risk posed by an enumerated offense. *Id.* at 1598. Given these circumstances, the "otherwise" clause is unconstitutionally vague when applied to DWI.

As Justice Scalia noted in his dissent in *James*, the best solution to the vagueness problems of the "otherwise" clause is to devise "a coherent way of interpreting the statute so that it applies in a relatively predictable and administrable fashion to a smaller subset of crimes" than virtually every crime. *Id.* at 1609 (Scalia, J., dissenting). Mr. Begay has demonstrated above under points I and II that there is such a way which is in keeping with well-established rules of statutory construction and the language, structure, purpose, and legislative history of the ACCA. To avoid the serious constitutional vagueness issues raised by applying the ACCA to DWI, this Court should adopt Mr. Begay's interpretation of the "otherwise" clause and hold that the clause does not include DWI.

3. Second, determining that DWI meets the "otherwise" clause standard seriously implicates the separation-of-powers doctrine. "[D]efining crimes and fixing penalties are legislative, not judicial, functions." *Evans*, 333 U.S. at 486. Interpreting and applying law that Congress enacted is a judicial function. While trial judges have the power, ancillary to their power to pronounce sentence, to decide what factors justify a greater or lesser sentence within a statutory range Congress has set, they do not have the power to determine the circumstances that set the statutory range. *Mistretta v. United States*, 488 U.S. 361, 378 n.11, 390-91, 395 (1989); *id.* at 417-18 (Scalia, J., dissenting).

In this case, to determine that DWI "presents a serious potential risk of physical injury to another," the Tenth Circuit, in compliance with its "all crimes" interpretation, made a fact and policy based assessment that New Mexico DWI presents such a risk, or that "[m]any would say" it did, JA 92, so as to

warrant a fifteen-year-to-life sentencing range. That assessment required "an essentially legislative judgment," *Thomas*, 159 F.3d at 299-300, with the effect of "bind[ing and] regulat[ing] the primary conduct of the public [and] vest[ing] in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime" determined to fit the "otherwise" clause. *See Mistretta*, 488 U.S. at 396. This is law making. It is not statutory construction and goes beyond the determination of a sentence within a range set by Congress. *See Evans*, 333 U.S. at 486-87 (when courts do too much to fill the gaps in legislation, they have performed a legislative function).

This Court can avoid encroaching on the legislating province of Congress by adopting Mr. Begay's sound, well-supported interpretation of the "otherwise" clause and hold that the clause does not include DWI.

4. Third, the district court's and Tenth Circuit's finding that DWI "presents a serious potential risk of physical injury to another" also raises grave questions with respect to Mr. Begay's rights under the Fifth and Sixth Amendments. If this Court adopts an "all crimes" interpretation, district courts will be required to hear evidence to resolve the factual question of whether particular offenses present a serious potential risk of physical injury to another. Because the finding will raise the statutory maximum, the full panoply of Fifth and Sixth Amendment rights must apply. *See United States v. Booker*, 543 U.S. 220, 230 (2005); *Apprendi*, 530 U.S. at 476; *Jones*, 526 U.S. at 243 n.6. Even when courts find facts to determine a sentence within a range set by Congress, the basic due process requirements of notice, a meaningful opportunity to be heard, and a burden of proof borne by the government apply. *See*

Rita v. United States, 127 S. Ct. 2456, 2465 (2007), *reh'g denied*, 2007 WL 2349931 (Aug. 20, 2007); *Burns v. United States*, 501 U.S. 129, 137-38 (1991); *United States v. Tucker*, 404 U.S. 443, 447 (1972).

None of those requirements were complied with here. To avoid a violation of Mr. Begay's constitutional procedural rights, and to avoid mini-trials on this factual issue as well, this Court should adopt Mr. Begay's "similar crimes" interpretation of the "otherwise" clause and hold that the clause does not include DWI.

B. The Rule Of Lenity Prohibits Inclusion Of Recidivist DWI, As Defined Under New Mexico Law, In The ACCA's "Otherwise" Clause.

Finally, even assuming arguendo the above considerations fail clearly to establish DWI is not a "violent felony" under the ACCA, the rule of lenity requires the resolution of doubt in Mr. Begay's favor. The rule of lenity provides that when a criminal statute is ambiguous, doubts must be resolved in favor of the defendant. *United States v. Bass*, 404 U.S. 336, 348 (1971); *see also United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."). The rule applies not only to the interpretation of statutes defining offenses, but also to penalty provisions. *United States v. Bifulco*, 447 U.S. 381, 387 (1980). This Court "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958).

The rule of lenity serves at least three purposes. First, it ensures fair notice. "[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

Second, it preserves the separation of powers. As Chief Justice Marshall observed: "the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. at 95; *see also Bass*, 404 U.S. at 348 ("because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity"). "This policy 'embodies the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'" *Bass*, 404 U.S. at 348. Lenity prevents the imposition of punishment that Congress has not clearly authorized, because Congress is the only branch of government with the authority to establish criminal penalties. *See Evans*, 333 U.S. at 486.

Third, it "minimize[s] the risk of selective or arbitrary enforcement" of criminal statutes by requiring the resolution of ambiguity in the same direction. *United States v. Kozminski*, 487 U.S. 931, 952 (1988); *see also Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting) (rule of lenity "foster[s] uniformity in the interpretation of criminal statutes").

In this case, Mr. Begay has presented strong arguments that: the ACCA's "otherwise" clause includes only violent, active property offenses with a *mens rea* requirement that would provide a means of

livelihood for career criminals and that would be more dangerous if committed with a gun; "violent felonies" do not include offenses that are misdemeanors, absent application of a recidivist statute; and DWI, as defined under New Mexico law, does not present a serious potential risk of physical injury to another. At the very least, then, ambiguity exists whether DWI is a "violent felony" under the ACCA. This Court must resolve any such ambiguity in favor of precluding application of the ACCA to DWI. *See Leocal*, 543 U.S. at 11-12 & n. 8 (if 18 U.S.C. § 16 lacked any clarity as to whether it included DWI, this Court would be constrained to interpret any ambiguity in the petitioner's favor); *United States v. Granderson*, 511 U.S. 39, 54 (1994) (applying rule of lenity in deciding the "original sentence" that established the duration of the revocation sentence was the Guidelines sentence, not the revoked term of probation); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978) (rule of lenity required an interpretation that precluded an additional sentence enhancement under 18 U.S.C. § 924(c)), *superseded by statute*, Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 1238-39 (1984), *as recognized in United States v. Gonzales*, 520 U.S. 1, 10 (1997)).

If necessary, application of the constitutional avoidance doctrine and the rule of lenity precludes inclusion of New Mexico recidivist DWI in the "otherwise" clause. Therefore, Mr. Begay's DWI convictions are not for "violent felonies" under the ACCA. The ACCA does not apply to Mr. Begay.

CONCLUSION

For the reasons stated above, this Court should reverse the Tenth Circuit's judgment affirming

application of the ACCA to Mr. Begay and remand with instructions not to apply the ACCA to Mr. Begay.

Respectfully submitted,

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APPENDIX

APPENDIX A

The Fifth Amendment to the United States Constitution provides in relevant part as follows: No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . .

APPENDIX B

The Sixth Amendment to the United States Constitution provides in relevant part as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; . . . .

APPENDIX C

Section 922(g) of Title 18 of the United States Code provides in relevant part as follows:

> It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

APPENDIX D

Section 924(a)(2) of Title 18 of the United States Code provides in relevant part as follows:

> Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

APPENDIX E

Section 924(e) of Title 18 of the United States Code provides in relevant part as follows:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection— . . .
>
> > (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, . . . that—
> >
> > > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> > >
> > > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; . . . .

APPENDIX F

New Mexico Statute § 31-18-15 (2001) provided in relevant part as follows:

> A. If a person is convicted of a noncapital felony, the basic sentence of imprisonment is as follows: . . .
>
> > (6) for a fourth degree felony, eighteen months imprisonment . . . .

APPENDIX G

New Mexico Statute § 66-8-102 provides in relevant part as follows:

> A. It is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state.
>
> B. It is unlawful for a person who is under the influence of any drug to a degree that renders him incapable of safely driving a vehicle to drive a vehicle within this state.
>
> C. It is unlawful for a person who has an alcohol concentration of eight one hundredths or more in blood or breath to drive a vehicle within this state . . . .
>
> E. A person under first conviction pursuant to this section shall be punished, . . . by imprisonment for not more than ninety days or by a fine of not more than five hundred dollars ($500), or both; . . .
>
> F. A second or third conviction pursuant to this section shall be punished, . . . by imprisonment for not more than three hundred sixty-four days or by a fine of not more than one thousand dollars ($1,000), or both; . . .
>
> G. Upon a fourth or subsequent conviction pursuant to this section, an offender is guilty of a fourth degree felony, as provided in Section 31-18-15 NMSA 1978, and shall be sentenced to a jail term of not less than six months, which shall not be suspended or deferred or taken under advisement . . . .

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No. 06-11543

In the Supreme Court of the United States

LARRY BEGAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's prior felony convictions for driving while intoxicated qualify as "violent felon[ies]" under 18 U.S.C. 924(e) (2000 & Supp. II 2002).

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In the Supreme Court of the United States

No. 06-11543

LARRY BEGAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 78-121) is reported at 470 F.3d 964. The memorandum opinion and order of the district court (J.A. 46-52) is reported at 377 F. Supp. 2d 1141.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2006. A petition for rehearing was denied on February 21, 2007 (J.A. 122). The petition for a writ of certiorari was filed on May 22, 2007, and was granted on September 25, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of New Mexico to possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). The district court determined that petitioner had at least three prior convictions for "violent felon[ies]" as defined by the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. II 2002),[1] which required a mandatory minimum 15-year sentence. J.A. 46-52. The court sentenced petitioner to 188 months of imprisonment. J.A. 67. The court of appeals affirmed the district court's conclusion that petitioner was subject to a mandatory minimum sentence under the ACCA, and it reversed and remanded for resentencing in accordance with *United States* v. *Booker*, 543 U.S. 220 (2005). J.A. 78-121.

1. Section 922(g)(1) of Title 18, United States Code, makes it unlawful for a person who has been convicted of a felony to possess a firearm. Violation of that provision ordinarily carries a maximum term of imprisonment of ten years. 18 U.S.C. 924(a)(2). As amended in 1986, the ACCA provides for enhanced penalties for persons convicted of violating Section 922(g)(1) who have three prior convictions "for a violent felony or a serious drug offense," 18 U.S.C. 924(e)(1). See *Taylor* v. *United States*, 495 U.S. 575, 582-588 (1990) (describing the evolution of the ACCA). The ACCA defines a "violent fel-

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[1] All subsequent citations in this brief to 18 U.S.C. 924(e) refer to 18 U.S.C. 924(e) (2000 & Supp. II 2002).

ony" as "any crime punishable by imprisonment for a term exceeding one year" that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. 924(e)(2)(B). The ACCA provides that a defendant who has been convicted of three such crimes is subject to a mandatory minimum sentence of 15 years of imprisonment. 18 U.S.C. 924(e)(1).

2. In September 2004, after a night of heavy drinking, petitioner pointed a .22 caliber rifle at his aunt and threatened to shoot if she did not give him money. When she replied that she had no money, petitioner repeatedly pulled the rifle's trigger. The rifle was unloaded, however, and did not fire. Petitioner then approached his sister and threatened her with the rifle in a similar fashion. His sister later called the police, who discovered the rifle under a mattress in petitioner's room. J.A. 47, 79; Presentence Report (PSR) ¶¶ 9-12, 66. Petitioner was arrested and charged with one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Petitioner pleaded guilty to the felon-in-possession charge. J.A. 8-13.

3. The indictment recited that petitioner had three prior felony convictions for driving while intoxicated, all entered in New Mexico. J.A. 6-7. At sentencing, it was undisputed that petitioner had been convicted on at least 12 occasions for "driving under the influence of intoxicating liquor or drugs" (DUI), in violation of N.M. Stat.

Ann. § 66-8-102 (Michie 2002).[2] J.A. 48. It was likewise undisputed that at least three of those DUI convictions constituted felonies under Section 66-8-102(G), which provides that, "[u]pon a fourth conviction pursuant to this section, an offender is guilty of a fourth degree felony" and may be sentenced to a term of imprisonment of eighteen months.[3] N.M. Stat. Ann. §§ 66-8-102(G); see J.A. 39-45 (records of judgment), 48.

Based on these felony convictions, the district court concluded that petitioner was subject to sentencing under the ACCA because his felony DUI offenses were "violent felonies" for purposes of the ACCA in that they "involve[] conduct that presents a serious potential risk of physical injury to another." J.A. 51-52; see 18 U.S.C. 924(e)(2)(B)(ii). The court accordingly found that petitioner was subject to the ACCA's mandatory minimum of 180 months of imprisonment. See 18 U.S.C. 924(e)(1). Applying the then-advisory Sentencing Guidelines, the court sentenced petitioner to 188 months of imprisonment, to be followed by three years of supervised release. J.A. 67-75.

4. The court of appeals affirmed in relevant part. J.A. 78-121. The court began by noting that, to deter-

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[2] Unless otherwise noted, all subsequent citations in this brief to N.M. Stat. Ann. § 66-8-102 refer to N.M. Stat. Ann. § 66-8-102 (Michie 2002).

[3] Under the New Mexico statutory scheme, a second DUI conviction requires a mandatory minimum sentence of "a jail term of not less than ninety-six consecutive hours, not less than forty-eight hours of community service and a fine of five hundred dollars," and a third DUI conviction requires a mandatory minimum sentence of "a jail term of not less than thirty consecutive days, not less than ninety-six hours of community service and a fine of seven hundred fifty dollars," N.M. Stat. Ann. § 66-8-102(F)(1) and (2) (Michie 2007). Cf. App., *infra*, 3a.

mine whether an offense is a "violent felony" under the ACCA, a court must employ the "categorical approach" described in *Taylor*, *supra*, and *Shepard* v. *United States*, 544 U.S. 13 (2005). J.A. 82. Following that approach, the court looked only to "the statutory definition of the crime" to determine if it qualified as a "violent felony." *Ibid.* The court concluded that felony DUI, as defined by New Mexico law, "is encompassed by the natural meaning of the statutory language 'any crime . . . that . . . involves conduct that presents a serious potential risk of physical injury to another,'" explaining that DUI "certainly presents such a risk." J.A. 91-92. The court rejected petitioner's argument that the "ordinary meaning" of "violent felony" would not encompass DUI, concluding that it should "look to the statutory definition of the term and begin with the ordinary meaning of that language rather than with the 'ordinary meaning' of the term that Congress thought it advisable to define." J.A. 92. The court also rejected the argument that the short title of the statute, "The Armed Career Criminal Act," restricts the scope of the ACCA to crimes often committed as a means of livelihood, concluding that "[i]t would be rather unusual, and disrespectful to legislative drafting, to let such a title override statutory language." *Ibid.*[4]

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[4] Although the court of appeals affirmed the district court's application of the 180-month mandatory minimum pursuant to the ACCA enhancement, it unanimously held that the district court erred in imposing a 188-month sentence on the understanding that, "in order for me to go below the guidelines, I have to make a finding that, under the sentencing factors, [a] sentence of 188 months [would be] unreasonable." J.A. 99. The court of appeals remanded for resentencing, explaining that a court "may impose a non-Guidelines sentence if the sentencing factors set forth in [18 U.S.C.] 3553(a) warrant it, even if a Guidelines sentence might also be reasonable." J.A. 100-101.

In separate opinions, Judge Hartz and Judge Lucero each rejected petitioner's contention that the ACCA's "otherwise" clause does not encompass all offenses that "involve[] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), but rather only those offenses similar in kind to those enumerated in the statute: namely, burglary, arson, extortion, and offenses involving the use of explosives.

Judge Hartz concluded that neither the purpose of the statute, its history, or application of canons of construction could override the ordinary meaning of the definition of "violent felony" as encompassing all felony offenses involving a serious risk of physical injury. First, Judge Hartz concluded that, because the ACCA's statutory purpose is to punish more severely those felons in possession "who have a confirmed history of displaying contempt for human life or safety, * * * * there is nothing remarkable about including felony [DUI] as a 'violent felony.'" J.A. 94. Turning to the legislative history of the "otherwise" clause, Judge Hartz noted that the references to burglary, arson, extortion, and offenses involving the use of explosives were added to the definition *after* Congress had already defined "violent felony" as, inter alia, a felony that involves "conduct that presents a serious potential risk of physical injury to another." J.A. 96. Judge Hartz took the view that the "more plausible" interpretation of this chronology was that Congress added the reference to the specific offenses only to make clear that the term "violent felony" encompassed the newly listed offenses in addition to a wide range of other safety-threatening offenses like DUI, rather than to limit the scope of the definition. J.A. 96-97. But he concluded that the history was in any event ambiguous, and "not particularly persuasive either

way." J.A. 95-97. Finally, Judge Hartz rejected petitioner's invocation of the canons of *ejusdem generis* and *noscitur a sociis* to argue that the conduct encompassed by the "otherwise" clause must be similar in kind to burglary, arson, extortion, and explosives use. He noted that the "primary definition" of the word "otherwise" is "in a different way or manner," such that the clause that follows that word is properly understood to include "conduct that presents (*in a manner different from* burglary, arson, etc.) a serious risk of physical injury to another," J.A. 98. Thus, he concluded, "[t]he use of *otherwise* in the statute negates the two canons." *Ibid.*

In a short concurring opinion, Judge Lucero agreed that "a conviction for felony driving while under the influence falls within the ambit" of Section 924(e)(2)(B)(ii). J.A. 104. Judge Lucero concluded that "the language of the statute is so clear and unambiguous that it does not allow resort to the legislative history." *Ibid.* Judge Lucero observed that DUI "may not have been in the minds of the 1986 amendment's sponsors when they drafted [Section 924(e)(2)(B)(ii)'s] residual language," but concluded that, given the clarity of that language, "[i]f a change is to be made, it is for Congress, not the courts, to make." *Ibid.*

Judge McConnell dissented. J.A. 104-121. Judge McConnell took the view that "[b]y using the word 'otherwise,' Congress indicated a substantive connection between the enumerated crimes and the general phrase." J.A. 110. He concluded, based on the legislative history and purpose of the statute, as well as application of the canons of *ejusdem generis* and *noscitur a sociis*, that the ACCA's "otherwise" clause "should be restricted to violent, active crimes which, like burglary, arson, extortion, and crimes involving explosives, are typical of ca-

reer criminals, and which are more dangerous when committed in conjunction with firearms." J.A. 119.

SUMMARY OF ARGUMENT

Petitioner's felony convictions for driving while intoxicated constitute "violent felon[ies]" within the meaning of the Armed Career Criminal Act because that offense "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(E)(2)(B)(ii). A person who exercises control of a vehicle while intoxicated runs a substantial risk that he will injure or even kill pedestrians, passengers, and other drivers. Recidivism—the prerequisite for felony treatment of petitioner's offenses—greatly enhances that risk, because the repetition of the offense evinces increased recklessness about the potential for inflicting harm.

A. In *James* v. *United States*, 127 S. Ct. 1586 (2007), this Court confirmed that an offense qualifies as a "violent felony" under the ACCA if, by its nature, it poses a serious risk of physical injury to others. That is the case with respect to felony driving under the influence (DUI). As this Court has long recognized, drunk driving takes an enormous toll in lives and injuries. DUI laws exist for precisely this reason: State legislatures have determined that DUI presents a sufficiently significant danger to the public that it warrants criminal penalties, and that repeat offenses are sufficiently serious as to warrant enhanced penalties. Empirical studies confirm the States' determination. Like the offenses Congress specifically enumerated in Section 924(e)(2)(B)(ii)—namely, burglary, arson, extortion, and offenses involving the use of explosives—recidivist drunk driving poses serious risks of harm. The Sentencing Commission apparently

concurs in that view. Although it has acted to exempt the crime of felon-in-possession from the Guidelines cognate "crime of violence" provision, Guidelines § 4B1.2(a)(2), it has never repudiated the court of appeals' uniform conclusion that felony DUI is an offense that presents a serious risk of physical injury to others.

Petitioner argues that, under the categorical approach of *Taylor* v. *United States*, 495 U.S. 575 (1990), his New Mexico DUI offenses do not implicate sufficient risk. That claim misreads state law and unjustifiably minimizes the risks that the DUI offense poses. Merely driving after consuming alcohol is not sufficient to constitute DUI; a driver must be actually impaired or have a .08 blood or breath alcohol level, a level at which studies show virtually all drivers are impaired. And although it may be possible to hypothesize situations in which operating a vehicle while impaired by alcohol might not pose a serious risk to others, it is not necessary that *every* application of the statute pose a serious risk; it is enough that the conduct covered by New Mexico's DUI statute poses a serious risk "in the ordinary case." *James*, 127 S. Ct. at 1597.

B. Petitioner's primary contention is that an offense not specifically enumerated in clause (ii) of the definition of "violent felony" should qualify as a predicate offense only if it is "similar" to the enumerated offenses of burglary, arson, extortion, and explosives use in that it is a "violent, active property crime that is typically committed by career criminals as a means of livelihood and that is more dangerous when committed with a firearm." Pet. Br. 14. That definition could be a plausible, if somewhat difficult to apply, legislative option, but it is not the one Congress adopted. None of those limitations appears anywhere in clause (ii). Nor do the enumerated

crimes share all of the attributes that petitioner would ascribe to them. Congress drafted the ACCA's definitional provision deliberately, and that provision itself identifies the sole defining characteristic of crimes that fall within the scope of Section 924(e)(2)(B)(ii): that the offense involve conduct that presents a serious risk of physical injury to others.

Because the text of Section 924(e)(2)(B)(ii) is clear and unambiguous, plaintiff's efforts to identify additional limitations in the term "violent felony," which that Section defines, are unavailing. Unlike in *Leocal* v. *United States*, 543 U.S. 1 (2004), which concerned whether DUI qualified as a "crime of violence" under 18 U.S.C. 16, which defines the term to include offenses involving the "use" or risk of "use" of force, the language of the ACCA's definition provision is not susceptible of varying interpretations. *Leocal* itself distinguished the "use" of force language in Section 16 from the "serious potential risk of physical injury" formulation that Congress employed in Section 924(e)(2)(B). Petitioner's argument would collapse the two. Any preconception of how the term "violent felony" might be used in other contexts cannot override the plain meaning of the words Congress actually used to define the term for purposes of the ACCA.

Nor can the title of the Act (the "Armed Career Criminal Act") be understood to narrow the scope of the Section 924(e)(2)(B); titles are of use only when they shed light on statutory ambiguity, which does not exist here. Even if, as petitioner argues, Congress's purpose when it initially enacted the ACCA was to target criminals who made their living by engaging in certain forms of criminal activity, when it drafted Section 924(e)(2)(B) to expand the range of predicate offenses covered by the

statute, it did not limit the covered offenses solely to crimes ordinarily committed as a means of livelihood. Arsonists and those who use explosives do not ordinarily do so as a matter of vocation; nor are their crimes necessarily more dangerous if committed in conjunction with possession of a firearm.

Petitioner also errs in suggesting that predicate crimes in the ACCA's "otherwise" clause must have *mens rea*. The presumption of *mens rea* applies to the *elements* of an offense, not to a sentencing factor. In any event, DUI is almost invariably the product of knowing conduct and has an inherent mental state of recklessness. States do not require an additional mental element because it would be absurd to require proof of a mental state for DUI that intoxication itself might negate.

C. Petitioner relies on the legislative history, the canon of constitutional avoidance, and the rule of lenity in an effort to prevent application of the plain statutory text. The legislative history, to the extent it is relevant, supports the view that Congress's goal in drafting Section 924(e)(2)(B)(ii) was to reach felonies that inherently present a risk of harm to others, and that it added specific references to the enumerated crimes to add certainty, not to limit what became the "otherwise" clause. The principle of constitutional avoidance has no application here, because, as this Court held in *James*, the statute is not vague; the determinations it requires are well within the competence of the judiciary; and the legal elucidation of the statute implicates no Sixth Amendment issue. Finally, the rule of lenity is inapplicable, because the language of the statute is not ambiguous. Under a straightforward application of the text, felony DUI qualifies as a predicate offense under the ACCA.

D. Finally, petitioner argues (for the first time in any appellate proceedings in this case) that his offenses were not punishable by more than one year of imprisonment. Even though petitioner himself, as a repeat offender, faced sentences of at least 18 months for his fourth and successive DUI offenses, he relies on the fact that a first, second, or third offense is a misdemeanor. As the government explains in *United States* v. *Rodriquez*, No. 06-1646 (to be argued Jan. 15, 2008), for purposes of the ACCA, the relevant "maximum term of imprisonment" for a repeat offender is the maximum sentence prescribed by law for recidivists. It would be bizarre if the "maximum term of imprisonment" for petitioner's repeat-offender crimes were lower than the terms of imprisonment that petitioner actually received.

ARGUMENT

PETITIONER'S FELONY CONVICTIONS FOR DRIVING UNDER THE INFLUENCE QUALIFY AS "VIOLENT FELONIES" UNDER THE ARMED CAREER CRIMINAL ACT

The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. II 2002), defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another," or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B). Petitioner's felony DUI convictions qualify as violent felonies under that definition because repeated DUI violations involve "conduct that presents a serious potential risk of physical injury to another." The court of appeals'

decision accords with the decisions of every other court of appeals to address the issue.[5]

A. Recidivist Drunk Driving Under New Mexico Law Qualifies As A "Violent Felony" Under The ACCA Because It Involves Conduct That "Presents A Serious Risk of Physical Injury to Another"

Driving while intoxicated poses a significant danger because a driver who is impaired by alcohol poses a heightened danger of causing an accident that can result in injury or death. See, *e.g.*, *Michigan* v. *Sitz*, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."). A recidivist offense that qualifies as a felony entails an increased risk because the repetition of the offense displays an enhanced degree of recklessness towards others' safety. The ACCA's residual clause classifies a crime as "violent felony" based on the determination that the conduct involved in the offense "presents a serious potential risk

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[5] See *United States* v. *McCall*, 439 F.3d 967, 971-972 (8th Cir. 2006) (en banc); *United States* v. *Sperberg*, 432 F.3d 706, 708-709 (7th Cir. 2005). Courts of appeals have also uniformly reached the same conclusion with respect to the materially identical language of Sentencing Guidelines § 4B1.2(a)(2), which defines the term "crime of violence" to include, inter alia, a felony that "is burglary of a dwelling, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.*" U.S.S.G. § 4B1.2(a)(2) (emphasis added); see *United States* v. *Veach*, 455 F.3d 628, 636-637 (6th Cir. 2006); *United States* v. *McGill*, 450 F.3d 1276, 1279-1280 (11th Cir. 2006); *United States* v. *Moore*, 420 F.3d 1218 (10th Cir. 2005); *United States* v. *DeSantiago-Gonzalez*, 207 F.3d 261, 264 (5th Cir. 2000); *United States* v. *Rutherford*, 54 F.3d 370 (7th Cir.), cert. denied, 516 U.S. 924 (1995).

of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). Felony DUI satisfies that standard.

1. In *James* v. *United States*, 127 S. Ct. 1586 (2007), this Court clarified the meaning of ACCA's "otherwise" clause in considering whether attempted burglary qualifies as a "violent felony" within the meaning of Section 924(e)(2)(B)(ii). Rather than seek a textually unspecified common denominator in the four crimes that precede Section 924(e)(2)(B)(ii)'s "residual provision" for crimes that "otherwise involv[e] conduct that presents a serious potential risk of physical injury to another," *James*, 127 S. Ct. at 1591, the Court focused on the only common attribute the provision identifies. It thus confirmed that a felony offense qualifies as a "violent felony" under ACCA's residual provision "[a]s long as [the] offense is of a type that, by its nature, presents a serious potential risk of injury to another." *Id.* at 1597. Finding that the degree of risk posed by attempted burglary is comparable to the risk posed by burglary, an offense specifically enumerated in the statute, the Court in *James* held that attempted burglary falls within the ACCA's residual provision. *James* made clear several propositions that demonstrate why the residual provision covers felony DUI as well.

First, like the court of appeals in this case (J.A. 82), the Court in *James* employed the "categorical approach" of *Taylor* v. *United States*, 495 U.S. 575 (1990), to determine whether attempted burglary falls within the ACCA's residual provision. *James*, 127 S. Ct. at 1593-1594; accord *id.* at 1602 (Scalia, J., dissenting). Under that approach, a court looks to the statutory definition of the offense to determine "whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the

specific conduct of this particular offender." *Id.* at 1594; accord *Shepard* v. *United States*, 544 U.S. 13, 17 (2005); *Taylor*, 495 U.S. at 600, 602.

Second, and also like the court of appeals in this case (J.A. 97-98, 104), this Court held that an offense not specifically enumerated in clause (ii) of the statute qualifies as an ACCA predicate if it "involves conduct that presents a serious potential risk of physical injury to another," whether or not the offense is in other respects "of the same type" as the enumerated offenses of burglary, arson, extortion, and explosives use. *James*, 127 S. Ct. at 1591-1592. Although the Court acknowledged that the enumerated offenses may provide "one baseline from which to measure" whether other conduct presents a serious risk of injury, *id.* at 1594, it explained that "Congress' inclusion of a broad residual provision * * * indicates that it did not intend the preceding enumerated offenses to be an exhaustive list of the types of crimes that might present a serious risk of injury to others and therefore merit status as a § 924(e) predicate offense," *id.* at 1593; see also *id.* at 1602-1603 & n.1, 1609 (Scalia, J., dissenting) (noting that the "defining characteristic of the residual provision" is "serious potential risk of physical injury to another" and that "the four [listed] examples have little in common").

Finally, the Court held that, because "potential risk" are "inherently probabilistic concepts," application of the categorical approach to the residual provision does not mean that *all* cases that would arise under the statute of conviction must present a serious potential risk of physical injury to another. *James*, 127 S. Ct. at 1597. "Rather, the proper inquiry is whether the conduct encompassed by the elements of the offense, *in the ordi-*

nary case, presents a serious potential risk of injury to another." *Ibid.* (emphasis added).

2. Felony DUI is an offense that by its nature presents a serious potential risk of physical injury and, therefore, based on the analysis in *James*, it is covered by the ACCA.

a. It is precisely because drunk driving categorically poses a risk of physical injury to others that it is a criminal offense under the laws of New Mexico, as well as every other State.[6] The DUI statute under which petitioner was convicted rests on a legislative judgment that "[i]ntoxicated drivers place the public, as well as themselves, at risk." *State* v. *Johnson*, 15 P.3d 1233, 1239 (N.M. 2000). The statute was enacted for the very purpose of protecting the public from the "potential harm posed by intoxicated drivers"—a "potential harm" that New Mexico deems "so compelling" as to warrant criminal penalties. *Id.* at 1239-1240.

In New Mexico, as in other states, a first-offense DUI is generally a misdemeanor offense. N.M. Stat. Ann. § 66-8-102(E) and (F). Individuals who *repeatedly* drive while intoxicated, however, are subject to felony convictions for that offense. *Id.* § 66-8-102(G) (making a fourth and subsequent DUI offense a fourth-degree felony). The penalties for repeat offenders are the product of "gradual and consistent increases in punishment * * * adopted to counter the problem of [driving while intoxicated]," *State* v. *Anaya*, 933 P.2d 223, 228 (N.M. 1996), and reflect a commonsense judgment that a person who *repeatedly* violates the DUI law, and does so despite escalating sanctions, poses a grave risk of physi-

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[6] National Conf. of State Legislatures, *State .08 BAC Laws* (July 2004) (*State .08 BAC Laws*)<http://www.ncsl.org/programs/lis/dui/bac08.html>.

cal injury to others. See *United States* v. *McCall*, 439 F.3d 967, 972 (8th Cir. 2006) (en banc).

b. The legislative judgment of New Mexico and other States is confirmed by numerous studies showing that drunk driving generally—and repeated drunk driving in particular—poses a serious risk of injury. For decades, this Court "has repeatedly lamented the tragedy" of "the carnage caused by drunk drivers." *South Dakota* v. *Neville*, 459 U.S. 553, 558 (1983). In 2006, 17,602 persons died from alcohol-related motor vehicle crashes in the United States, which represents more than 41% of all traffic-related deaths. Of the total number of alcohol-related fatal crashes, 15,121, or 86%, involved drivers with a blood alcohol concentration of 0.08 or higher.[7] And of this group of drivers, 80% were drivers who had one or more prior DUI convictions.[8] Studies show that, while the proportion of repeat offenders is relatively small relative to the general population,

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[7] NHTSA, *Traffic Safety Facts* tbl. 1 (Aug. 2007) (*NHTSA Safety Facts*) <http://www.nhtsa.dot.gov/portal/nhtsa_static_file_downloader.jsp?file=/staticfiles/DOT/NHTSA/NCSA/Content/RNotes/2007/810821.pdf>. In an effort to downplay the risks associated with drunk driving, petitioner's amicus asserts that NHTSA studies in fact show that alcohol is "involved" in only 2% of all motor vehicle crashes. NACDL Br. 3. The study on which petitioner's amicus relies for that proposition, however, merely shows that, of the 6,002 persons who responded to a telephone survey, those who had been involved in car crashes attributed the crash to alcohol consumption only 2% of the time. See NHTSA, *National Survey of Drinking and Driving Attitudes and Behaviors, 2001*, Traffic Tech 280, at 2 (June 2003) <http://www.nhtsa.dot.gov/people/injury/research/Traffic-Tech2003/TT280/pdf>. This survey says nothing about the rate at which alcohol-related accidents actually occur, or about the prevalence of a nexus to alcohol in fatal crashes.

[8] *NHTSA Safety Facts* tbl. 10.

repeat offenders are "disproportionately responsible for alcohol-related crashes and other problems associated with drunk driving."[9] A person with multiple DUI convictions is far more likely to drive with a high blood alcohol content, and is thus far more likely to cause a fatal accident.[10]

c. The risks associated with felony drunk driving are comparable *in kind* to the risks associated with the offenses enumerated in Section 924(e)(2)(B)(ii)—burglary, arson, extortion, and crimes involving the use of explosives. Any of those offenses can cause bodily injury to another. The risks of drunk driving are also comparable, if not greater, *in degree*. Hard statistical evidence of the magnitude of the risk of these crimes may not be available, nor is it obvious that the risk is uniform with respect to the four enumerated crimes. Likewise, there is no evidence that Congress intended analysis to proceed by comparative statistical analysis, as opposed to judicial judgment about the seriousness of the risk.[11]

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[9] Office of Community Oriented Policing Servs., U.S. Dep't of Justice, *Drunk Driving, Problem-Oriented Guides for Police, Problem-Specific Guides Series No. 36*, at 4 (Feb. 2006) (*Problem-Specific Guides*) <http://www.cops.usdoj.gov/mime/open.pdf?Item=1042> (footnote omitted); see generally Robert D. Brewer et al., *The Risk of Dying in Alcohol-Related Automobile Crashes Among Habitual Drunk Drivers*, 331 New Eng. J. Med. 513 (1994).

[10] *Problem-Specific Guides* 4.

[11] In *James*, the Court conducted a qualitative, rather than quantitative, evaluation of the risk associated with attempted burglary, using burglary as "one baseline from which to measure" whether attempted burglary involves conduct that "presents a serious potential risk of physical injury." 127 S. Ct. at 1594-1595. Although the principal dissent disagreed with the Court's evaluation of that risk, it conducted a similar qualitative comparison. *Id.* at 1607-1608 (Scalia, J., dissenting). As the dissent acknowledged, under the ACCA, courts must

But the degree of risk associated with the listed offenses is undoubtedly substantial, even though the statistical likelihood of injury in any given offense may be relatively small.[12] As with arson and explosives use, any drunk driver presents a risk of injury to others by exposing the public to an inherently dangerous activity—here, the operation of a vehicle by a driver who is impaired by alcohol. The risk, however, is far more substantial when a person drives drunk *repeatedly*, thereby displaying a heightened degree of indifference to the risk that his behavior entails. In so doing, he endangers the life of every person he passes.[13] And a drunk driver's victims have no warning of the danger they face, and thus have no way to protect themselves against it.

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decide, "without hard statistics to guide them, * * * the degree of risk of physical injury posed by various crimes." *Id.* at 1608 (internal quotation marks omitted).

[12] See, *e.g.*, U.S. Fire Admin., Dep't of Homeland Security, *Arson in the United States, Topical Fire Research Series* (Jan. 2001) <http://www.usfa.dhs.gov/downloads/pdf/tfrs/v1i8-508.pdf> (reporting that, of the 267,000 fires attributed each year to arson, there are approximately 2000 injuries and 475 deaths).

[13] Relying on an affidavit of Dr. Paul Zador, which was submitted for sentencing purposes in the United States District Court for the Western District of Texas, petitioner's amicus contends that the "probability of a given drunk driver harming someone else is very low." NACDL Br. 15. Dr. Zador's affidavit, however, emphasizes that "there is no valid national study in existence which answers th[at] specific question," NACDL Br. App. 4a, and his attempt to derive a single numerical answer necessarily rests on a series of speculative estimates. In any event, the question Dr. Zador asks is of limited relevance here, where the issue is not the risk of harm associated with isolated drunk-driving incidents, but the risk of harm posed by repeat offenders, a small group of individuals who are disproportionately responsible for alcohol-related crashes. See note 8, *supra*, and accompanying text.

d. The United States Sentencing Commission apparently shares the view that felony DUI is properly viewed as a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another," Guidelines § 4B1.2(a)(2). See *James*, 127 S. Ct. at 1596 (noting that the Commission has access to and relies on "empirical sentencing data" in framing the Guidelines, and treating the Sentencing Commission's conclusion that attempt crimes are covered as "crimes of violence" as "further evidence" that attempted burglary is covered under ACCA).

Beginning in 1995, the courts of appeals have consistently concluded that felony DUI falls within the comparably worded "otherwise" clause of Guidelines § 4B1.2(a)(2). See *United States* v. *Rutherford*, 54 F.3d 370 (7th Cir.), cert. denied, 516 U.S. 924 (1995); note 5, *supra* (citing cases). Although Congress provided that the Commission "periodically shall review and revise" the Guidelines, 28 U.S.C. 994(*o*), and thereby clarify them in response to judicial decisions, see *Braxton* v. *United States*, 500 U.S. 344, 348 (1991), the Commission has never amended Section 4B1.2 or its commentary to repudiate those decisions. That stands in contrast to the Commission's amendment of the Guidelines' commentary specifically to state that "'[c]rime of violence' does not include the offense of unlawful possession of a firearm by a felon," U.S.S.G. § 4B1.2 comment. (n.1). See *Stinson* v. *United States*, 508 U.S. 36, 47 (1993) (holding that the Commission's commentary excluding felon-in-possession offenses is binding because "it is not 'plainly erroneous or inconsistent' with § 4B1.2").

As the court of appeals recognized in *Rutherford*, felon-in-possession offenses are readily distinguishable from felony DUI offenses. "Possession of a firearm does

not in itself create a risk of injury; an offender must make a subsequent volitional choice (only tangentially related to the offense of possession) to fire or recklessly brandish the weapon. A decision to drive drunk is reckless from the start; no subsequent volitional act is necessary to create the risk." 54 F.3d at 377 n.15. The Commission's exclusion of felon-in-possession offenses from Section 4B1.2 thus logically accords with its action in leaving the decisions including felony DUI offenses undisturbed. It may be taken as some additional support for the commonsense view that DUI poses serious potential risks of physical injury.

e. Petitioner contends (Pet. Br. 41-44) that DUI, as defined by New Mexico law, does not "categorically" present a serious risk of injury within the meaning of *Taylor*, *supra*, because a person can violate the New Mexico DUI statute by (1) driving while impaired to "the slightest degree" by alcohol; (2) driving with a .08 blood or breath alcohol level; or (3) exercising control over a vehicle "while safely parked on private property." Pet. Br. 42. Petitioner's argument overlooks the meaning of the statute as defined by the State and the seriousness of the conduct that it prohibits.

First, N.M. Stat. Ann. § 66-8-102(A) provides that "[i]t is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state." New Mexico courts have interpreted the phrase "under the influence of intoxicating liquor" to mean that "intoxicating liquor" has affected the driver "so that, to the slightest degree, he is less able * * * to exercise the clear judgment and steady hand necessary to handle * * * [an] automobile with safety to himself and the public." *State* v. *Sisneros*, 82 P.2d 274, 278 (N.M. 1938) (internal quotation marks and citation omitted). Simply

driving after consuming alcohol is not "driving under the influence" within the meaning of this definition. *Ibid.* Rather, the central question under Section 66-8-102(A) is whether alcohol has impaired the driver's ability to handle an automobile safely. Such impairment is generally proved by behavioral evidence, such as erratic driving, failed sobriety tests, and slurred speech. See, *e.g.*, *State* v. *Notah-Hunter*, 113 P.3d 867, 873-874 (N.M. Ct. App. 2005); *State* v. *Gutierrez*, 909 P.2d 751, 753 (N.M. Ct. App. 1995). Driving while impaired by alcohol within the meaning of Section 66-8-102(A) is categorically a injury-risking activity.

Driving a vehicle with a .08 blood or breath alcohol level, which constitutes a per se violation of the statute, N.M. Stat. Ann. § 66-8-102(C), is also inherently injury-risking behavior. Studies show that "[v]irtually all drivers, even those who are experienced drinkers, are *significantly* impaired at a .08 [blood alcohol concentration]."[14] Drivers with blood alcohol concentrations of .08 to .09 are anywhere from 11 to 52 times more likely to be involved in a fatal crash, depending on their age and gender. Congress has accordingly determined driving with a blood alcohol concentration of .08 or greater should be prohibited nationwide, see Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 2008, 112 Stat. 337, and all 50 States, the District of Columbia, and Puerto Rico make it per se unlawful to drive with a blood alcohol concentration of .08 or greater.[15]

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[14] See National Highway Transportation Safety Admin. (NHTSA), *Traffic Safety Facts: .08 BAC Illegal* per se *Laws* 2 (Mar. 2004) (*.08 BAC Laws*) <http://www.nhtsa.dot.gov/people/injury/new-fact-sheet03/fact-sheets04/Laws-08BAC.pdf> (emphasis added).

[15] *State .08 BAC Laws.*

Finally, that defendants have been convicted under Section 66-8-102 while "exercising actual physical control" of non-moving vehicles does not mean that the conduct proscribed by Section 66-8-102 is not categorically injury-risking behavior. See *State* v. *Boone*, 731 P.2d 366, 367-368 (N.M. 1986) (upholding warrantless arrest of intoxicated individual discovered by police in the driver's seat of his automobile, stopped in a traffic lane with the engine running but the lights off); see also *State* v. *Johnson*, 15 P.3d 1233, 1240 (2000) (upholding convictions of intoxicated individuals discovered in the driver's seat of non-moving automobiles, with the key in the ignition, on private property). It may be that the defendants in these cases did not pose a serious risk of physical injury to the public at the moment when they were arrested. But see *ibid.* (explaining that "[a] person under the influence of intoxicating liquor or drugs who exerts actual physical control over a vehicle, is a threat to the safety and welfare of the public" because that person who "place[s] himself behind the wheel of the vehicle could * * * at any time start[] the automobile and drive[] away.") (internal quotation marks and citation omitted). But that does not distinguish New Mexico's DUI statute from any number of other offenses that are clearly encompassed by the ACCA's definition of "violent felony." See *James*, 127 S. Ct. at 1597. Just as an intoxicated driver might sit safely in a car with the keys in the ignition, so might a burglar break into a vacant home, far from anyone who might venture on the scene and confront him, see *ibid.*, or an arsonist set fire to an abandoned structure in a remote, uninhabited location. The categorical approach of *Taylor* does not require "that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of in-

jury before the offense can be deemed a violent felony"; it requires only that, "in the ordinary case," the conduct proscribed by the statute of conviction "present[] a serious potential risk of injury to another." *Ibid.* In the ordinary case, felony DUI poses a serious risk of injury to others. It is, for that reason, a "violent felony" within the meaning of the ACCA.

B. Petitioner's Interpretation Of The ACCA Is Contrary To The Text Of The Statute

Petitioner's primary argument for reversal is that the ACCA's "otherwise" clause, properly understood, includes only felony offenses that *both* (1) involve conduct presenting a serious potential risk of physical injury, *and* (2) are "similar" to the enumerated offenses of burglary, arson, extortion, and explosives use in Section 944(e)(2)(B)(ii) "in that they are violent, active property crimes that are typically committed by career criminals as a means of livelihood and that are more dangerous when committed with firearms." Pet. Br. 14.

Petitioner's argument finds no support in ACCA's text. As an initial matter, not all of the crimes listed in clause (ii) share the attributes that petitioner identifies. It is not at all clear, for example, that the use of explosives would satisfy petitioner's gloss if it were not expressly enumerated. For related reasons, petitioner's proposed definition would be extremely difficult to administer. And in any event, nothing in the statute suggests that Congress intended to limit application of the ACCA to crimes that both involve conduct that presents a serious risk of physical injury and share other attributes, none of which is identified in the text of the statute, with the crimes of burglary, arson, extortion, and explosives use. Petitioner's effort to engraft this lengthy se-

ries of atextual limitations on the ACCA's definitional provision is unavailing.

1. ***The ACCA's residual provision does not broadly require "similarity" to the enumerated offenses***

The text of Section 924(e)(2)(B)(ii) provides that a felony offense that is not burglary, arson, extortion, or explosives use qualifies as an ACCA predicate if it involves conduct that presents a serious risk of injury to others. The text does not require that such an offense be "similar" to these enumerated crimes in any respect other than its potential to cause harm to others.

Contrary to petitioner's contention (Pet. Br. 19-22), the "similar crimes" approach finds no support in the statute's use of the word "otherwise" to introduce the residual provision. "Otherwise" does not mean, as petitioner would have it (*id.* at 20-21), "similar to" or "of the same kind as," such that any word or phrase follows the word "otherwise" must share unspecified attributes of the words or phrase that precede it. On the contrary, "otherwise," when used as an adverb, means "in a different manner" or "in another way." *Webster's New International Dictionary* 1729 (2d ed. 1954);[16] see *James*, 127

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[16] "Otherwise" can also be used to mean "in other respects." *Webster's New International Dictionary* 1729 (2d ed. 1954). In two of the three examples petitioner offers in support of his argument (Pet. Br. 21), this Court interpreted the word "otherwise" according to this usage, and not, as petitioner contends, to mean "'similar' to other entities." See *Southeastern Cmty. Coll.* v. *Davis*, 442 U.S. 397, 405-406 (1979) (interpreting statutory prohibition of discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap" to apply in the case of individuals "able to meet all of a program's requirements in spite of [their] handicap"); *United States* v. *Mississippi*, 380 U.S. 128, 136-138 (1965) (interpreting statutory guarantee of right to vote to persons

S. Ct. at 1602 (Scalia, J., dissenting). And "otherwise" does not remotely mean "likewise," which seems to be how petitioner is attempting to interpret it. The "otherwise" clause itself thus identifies the only defining attribute of crimes that fall within the ACCA's residual provision: that the offense "involve[] conduct that present a serious potential risk of physical force against another." 18 U.S.C. 924(e)(2)(B)(ii); see *James*, 127 S. Ct. at 1592; *id.* at 1602-1603 (Scalia, J., dissenting) ("[T]he most natural reading of the statute is that committing one of the enumerated crimes (burglary, arson, extortion or crimes involving explosives) is *one way* to commit a crime 'involv[ing] conduct that presents a serious potential risk of physical injury to another'; and that *other ways* of commiting a crime of that character similarly constitute 'violent felon[ies].'").

Given that Congress has already identified the single relevant defining characteristic of felonies that fall within the scope of the residual clause, it is neither necessary nor appropriate to resort to the canons of *ejusdem generis* and *noscitur a sociis* to identify *additional*

"otherwise qualified by law to vote * * * without distinction of race, color, or previous condition of servitude" to apply to persons who legally qualified by law to vote in all respects other than their race). Petitioner's third example concerns a statutory provision providing for Supreme Court review of the final judgments of the circuit courts of appeals "by certiorari or otherwise." *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U.S. 290, 294-295 (1902) (citing Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 828). The Court in *Huguley* did not interpret the phrase "by certiorari or otherwise" to mean that "the manner of reaching the court *must* be of the same kind as certiorari," Pet. Br. 21 (emphasis added); it simply held that, as a matter of fact, there was no relevant means of appealing to the Court other than certiorari or its equivalent. *Huguley*, 184 U.S. at 295.

characteristics of such offenses. In *James*, this Court rejected a similar argument that, because the "common attribute" of the enumerated offenses is that each is a completed offense, the residual provision must also encompass only completed offenses, and thereby excludes attempted burglary from the scope of the ACCA. The Court noted that "the most relevant common attribute of the enumerated offenses of burglary, arson, extortion, and explosives use is not 'completion,'" but rather "that all of these offenses, while not technically crimes against the person, nevertheless create significant risks of bodily injury or confrontation that might result in bodily injury." 127 S. Ct. at 1592. In the Court's view, to impose additional limitations not identified in the text of the statute "would unduly narrow" the "expansive phrasing" of the residual provision. *Ibid.* What was true in *James* is equally true in this case. Nothing in the plain language of the statutory definition reveals any intent to limit the residual provision to offenses that are generally "similar" to burglary, arson, extortion, and explosives use.

2. ***The residual provision is not limited to crimes involving the intentional use of force or a substantial risk that force will be used***

Failing to identify a broad set of "similar crimes" limitations in the text of the ACCA's definition of "violent felony," petitioner attempts to locate one such limitation in the term defined. Relying primarily on this Court's decision in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), petitioner contends that the term "violent felony," separate and apart from Congress's definition of the term, indicates that the provision encompasses only offenses that are similar to burglary, arson, extortion, and explosives

use in that they involve "active violence." Pet. Br. 15-17. Petitioner does not specify precisely what he means by "active violence." But his test would effectively read the language in the statute at issue in *Leocal* into the ACCA, such that a felony offense under the ACCA would necessarily involve an intentional use of force, or "a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," *id.* at 16 (quoting 18 U.S.C. 16(b)). That effort effectively to alter the language of the ACCA cannot be sustained.

In *Leocal*, this Court considered whether DUI under Florida law is a "crime of violence" as defined in 18 U.S.C. 16, and therefore an "aggravated felony" that provides a basis for removal. 8 U.S.C. 1101(a)(43)(F), 1227(a)(2)(A)(iii). Section 16 of Title 18 defines the term "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. 16. Citing its decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), the Court held that the formulation "use . . . of physical force against the person or property of another" implies "active," intentional employment of force, and thus excludes DUI from the scope of Section 16(a). *Leocal*, 543 U.S. at 9-10. The Court further held that a DUI offense does not fall within the scope of Section 16(b), because Section 16(b) "contains

the same formulation," and thus requires that the perpetrator of the offense act in disregard of a substantial risk that he may be required to use physical force in committing a crime. *Id.* at 10-11. Finally, the Court found additional support for its conclusion in the "ordinary meaning" of the term "crime of violence," which, "combined with § 16's emphasis on the use of force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses." *Id.* at 11 (citing *United States* v. *Doe*, 960 F.2d 221, 225 (1st Cir. 1992)).[17]

Petitioner's argument would read an intentional use-of-force requirement into a statute that clearly does not provide for one. Unlike Section 16(b), the ACCA's residual provision does not define a "violent felony" according to the risk that force will be used, but according to the

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[17] In *Doe*, the First Circuit, in an opinion by then-Judge Breyer, held that possession of a firearm by a felon does not qualify as a "violent felony" under the ACCA. The court explained that it is difficult "to imagine such a risk of physical harm often accompanying the conduct that normally constitutes firearm possession." 960 F.2d at 224-225. The court also reasoned that, "[t]o include possession, one would have to focus upon the risk of direct *future* harm that present conduct poses," and that the term "violent felony" "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence" than merely "risk-creating" crimes such as DUI. *Id.* at 225. Notably, however, *Doe* relied in part on the Sentencing Commission's judgment to exclude felon-in-possession crimes from its parallel definition of "crimes of violence," *ibid.*, and the Commission has made no such judgment as to DUI offenses. See pp. 20-21, *supra*. In addition, as explained below, the ACCA's expansively worded residual provision unambiguously encompasses "risk-creating" crimes. Clause (ii) of the residual provision makes clear that Congress intended the term "violent felony" to cover a broader range of conduct than the term itself might otherwise "call to mind."

risk that physical injury will result. As this Court recognized in *Leocal*, those are two different things. Distinguishing Section 16(b) from the Sentencing Guidelines provision defining "crime of violence" as a crime involving "conduct that presents a serious potential risk of physical injury to another"—language that is materially identical to the formulation used in the ACCA—the Court noted that "[t]he risk that an accident may occur when an individual drives while intoxicated is simply not the same thing as the risk that the individual may 'use' physical force against another in committing the DUI offense." 543 U.S. at 10 n.7 (quoting Sentencing Guidelines § 4B1.2(a)(2)). Petitioner would collapse that distinction.

In *Leocal*, the Court referred to the "ordinary meaning" of the term "crime of violence" to *confirm* its interpretation of the definition of that term, where the meaning of the definitional phrase "use of force" was in dispute. In this case there is no similar dispute concerning the meaning of any term Congress has used to define the class of offenses that qualify as predicates for sentencing enhancement. Petitioner has identified no language in the definition that requires illuminating by the "ordinary meaning" of the term defined. Rather, petitioner's argument is that his "active violence" gloss on the term "violent felony" *overrides* the plain meaning of the words Congress chose to define that term. When Congress explicitly defines a term, however, that definition controls. See *Babbitt* v. *Sweet Home Chapter of Communities for a Great Ore.*, 515 U.S. 687, 697-698 n.10 (1995); 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 47:07, at 227-228 (6th ed. 2000) ("As a rule a definition which declares what a term means is binding upon the court."); *id.* at 232 ("A definition which

declares what a term means * * * excludes any meaning that is not stated.").

3. The residual provision is not limited to property crimes ordinarily committed as a means of livelihood that are more dangerous when committed with firearms

Petitioner's attempt (Pet. Br. 17-19) to limit the scope of the ACCA to "property offenses ordinarily committed as a means of livelihood" that "are more dangerous when committed with firearms" also fails. To begin with, petitioner's argument (*id.* at 19) that the "structure" of Section 924(e)(2)(B) limits the scope of the residual provision to "property crimes" merely repeats his argument that the offenses encompassed by the residual provision must share certain attributes, unspecified in the text, with the enumerated crimes of burglary, arson, extortion, and explosives use. For the reasons explained above, see pp. 25-27, *supra*, that argument lacks merit.

As for the "means of livelihood" and crimes "more dangerous when committed with a firearm" limitations, petitioner purports (Pet. Br. 17-19) to find support in the short title of the ACCA, the "Armed Career Criminal Act." According to petitioner, this title "restricts the scope of the 'otherwise' clause to serve the obvious intent of the Act," namely, "to keep firearms out of the hands of career criminals."

Petitioner's argument fails at the outset, since "the title of a statute * * * cannot limit the plain meaning of the text." *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947)) (alterations omitted). The title of a statute is useful in statutory interpretation "only when it sheds light on some ambigu-

ous word or phrase." *Ibid.* Petitioner has identified no word or phrase in the statute that he claims is ambiguous. Consideration of the title of the statute—which, as the court of appeals noted (J.A. 92), appears nowhere in the United States Code—is unwarranted.

In any event, while it is unquestionably true that the ACCA is designed "to keep firearms out of the hands of career criminals," Pet. Br. 18, it does not follow that the ACCA applies only to persons who are "career criminals" in the sense that they commit crime as a means of livelihood (as opposed to simply habitual offenders with a different day job), or persons who have committed crimes that would be more dangerous if committed with a firearm. Congress has imposed livelihood-type limitations in other laws, see 21 U.S.C. 848, but it did not do so here.

Even if, as petitioner argues, Congress's purpose when it initially enacted the ACCA in 1984 was to target criminals who made their living by engaging in robbery and burglary—the only two offenses that qualified as predicates for enhanced sentencing under that first version of the statute, see *Taylor*, 495 U.S. at 581—when it drafted Section 924(e)(2)(B) in 1986 to expand the range of predicate offenses covered by the statute, it did not limit the covered offenses solely to crimes ordinarily committed as a means of livelihood. Not all of the crimes encompassed by the ACCA's definition of "violent felony" are ordinarily committed "as a means of livelihood." Offenses involving the use of force that fall within the scope of Section 924(e)(2)(B)(i), such as assault, murder, and rape, are not ordinarily committed for the purpose of financial gain. Nor are all the offenses listed in Section 924(e)(2)(B)(ii)—burglary, arson, extortion, and use of explosives—characteristically committed as means of livelihood. Although there are undoubtedly some profes-

sional arsonists who make their living by collecting insurance proceeds, see, *e.g.*, *United States* v. *Korando*, 29 F.3d 1114 (7th Cir. 1994) (upholding defendant's conviction for involvement in a murder- and arson-for-profit ring under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*), persons frequently commit arson for a wide array of reasons other than insurance fraud, including vengeance, vandalism, and to conceal other crimes.[18] A person who commits a felony offense "involv[ing] the use of explosives" is at least equally unlikely to do so as a matter of vocation. It is, moreover, difficult to see how possession of a firearm would make either type of offense more dangerous, except insofar as any person caught in the midst of a criminal act—including, presumably, driving under the influence—generally poses a greater threat to an intervenor when he is armed.

The purpose petitioner ascribes to Section 924(e) is in fact the demonstrable purpose behind a separate provisions altogether—Section 924(c), which provides a mandatory minimum sentence of five years for any person "who, during and in relation to any crime of violence * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." 18 U.S.C. 924(c)(1)(A). That provision was designed to avoid the increased dangers that weapons add to violent crimes and to persuade the person who intends to commit such a crime to "leave his gun at home." *Muscarello* v. *United States*, 524 U.S. 125, 132 (1998) (quoting 114 Cong. Rec. 22,231 (1968) (Rep. Poff)). Section 924(e), however, serves a different purpose. As the statutory text itself makes clear, the ACCA is not designed to address the dangers associated

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[18] See generally *Arson in the United States*.

with the use of firearms during and in relation to a particular crime, but rather the dangers associated with possession of firearms by persons who have repeatedly committed serious criminal offenses that put the public at risk, and in so doing have demonstrated that they have little regard for the safety and well being of others. Congress determined that such individuals not only should be barred from possessing firearms, see 18 U.S.C. 922(g)(1), but should face significant consequences for violating that prohibition.

4. ***The residual provision does not categorically exclude offenses without a* mens rea *element***

Finally, petitioner argues (Pet. Br. 34-37) that the residual provision encompasses only offenses that have a *mens rea* element, and therefore must be construed to exclude felony DUI under New Mexico law, which, like other State DUI laws, makes driving under the influence a strict-liability offense. Nothing in the text of the ACCA supports that limitation. If the residual provision included only offenses involving a substantial risk that force will be used, then such a *mens rea* requirement might be appropriate. See *Leocal*, 543 U.S. at 9. But the ACCA is not so limited: The ACCA is founded on an objective risk of injury, not on the use of force, and nothing in the statute suggests that a particular *mens rea* is required to commit a predicate offense, so long as the predicate offense presents a serious risk of physical injury.

The presumption that Congress intends to require *mens rea* as an element of a crime, *Staples* v. *United States*, 511 U.S. 600, 605-606 (1994), has no applicability to this recidivist *sentencing provision*. Congress plainly *has* required *mens rea* as an element of the underlying federal crime for which petitioner is being punished.

Before a defendant may be considered for sentencing under the ACCA, the defendant must "knowingly" possessing a firearm after being convicted of a felony. 18 U.S.C. 922(g)(1), 924(a)(2) and (e)(1). The presumption of *mens rea* does not reach back into prior offenses for which a defendant has already been convicted and that may now enhanced his sentence. And even if the presumption against crimes without a *mens rea* element applied not only to federal crimes defined by Congress, but also to Congress's definition of the class of criminal convictions that qualify as predicates for enhanced sentencing, the presumption would have no force here. DUI offenses are not typical strict-liability crimes. As the Seventh Circuit has observed, the dangers of drunk driving are well known, *Rutherford*, 54 F.3d at 376, particularly to an individual who has repeatedly been convicted for that offense. To disregard those dangers is, by its nature, "a reckless act, perhaps an act of gross recklessness." *Ibid.* And New Mexico courts have made clear that "[v]oluntarily driving a vehicle while under the influence is an act malum in se and * * * *is substantial evidence of criminal intent.*" *State* v. *Dutchover*, 509 P.2d 264, 267 (N.M. Ct. App. 1973) (emphasis added). Courts do not require more specific evidence of intent, however, because allowing persons charged with DUI to defend their actions on the ground that they were "too intoxicated to form the conscious intent to drive drunk" would be "absurd and undoubtedly contrary to the statute's purpose." *State* v. *Harrison*, 846 P.2d 1082, 1087 (N.M. Ct. App. 1992); cf. *Montana* v. *Egelhof*, 518 U.S. 37, 44-45 (1996) (plurality opinion). The knowing nature of the conduct that produces intoxication combined with the inherent recklessness of the ensuing conduct more than suffices.

Nor does consideration of the purpose of the statute suggest a different result. A *mens rea* requirement cannot be inferred solely on the basis of Congress's purported concern with "career criminals," as petitioner defines the term (Pet. Br. 35). Congress nowhere required knowing pursuit of a livelihood as a hybrid form of *mens rea* for the ACCA. The purpose of the statute is not only to keep firearms out of the hands of persons who have repeatedly proved themselves ready and willing to use force when necessary in the commission of crime—the purpose served by Section 924(c)—but more broadly to keep firearms out of the hands of persons who "have a confirmed history of displaying contempt for human life or safety." J.A. 94. Enhancing the sentence of a person who repeatedly drives while intoxicated is entirely consistent with that purpose.

C. The Legislative History Does Not Support Petitioner's Interpretation

1. Petitioner contends (Pet. Br. 25-28) that legislative history supports his reading of the statute to exclude all offenses that are not "violent, active, property crimes that are typical of career criminals, and that are more dangerous when committed with firearms." Legislative history is relevant, however, only to the extent that it "shed[s] a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 567-568 (2005). Petitioner has identified no language that he claims is ambiguous, much less an ambiguity that could plausibly be illuminated by resort to legislative history—even if, as petitioner claims, that history showed that Congress, despite enacting an expansive residual

provision, nevertheless intended to impose a series of unspecified limitations on its application.

2. In any event, the legislative history of the ACCA does not show that Congress understood the provision to mean anything other than what it says: that a felony offense qualifies as a predicate offense for sentencing enhancement purposes as long as it involves conduct that presents a serious risk of physical injury to another. When Congress revised the ACCA in 1986 to expand the class of predicate offenses beyond robbery and burglary, it first considered two competing bills: one that covered as violent felonies crimes that had as an element the use of force as well as any felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," *Taylor*, 495 U.S. at 583 (quoting S. 2312, 99th Cong., 2d Sess. (1986) and H.R. 4639, 99th Cong., 2d Sess. (1986)), and one that was more limited to the use of force as an element, *ibid.* (quoting H.R. 4768, 99th Cong., 2d Sess. 1986)). Both bills came in for criticism, the first as potentially too broad, the second as too narrow. *Id.* at 584-586. A new bill emerged that defined the term violent felony to include a crime that:

> (i) has an element the use, attempted, use or threatened use of force against the person of another; or
>
> (ii) involves conduct that presents a serious potential risk of physical injury to another.

H.R. 4885, 99th Cong., 2d Sess. (1986), quoted in *Taylor*, 495 U.S. at 586. That provision, with its freestanding application to injury-risking crimes, was understood by the House Committee on the Judiciary to encompass property crimes such as "burglary, arson, extortion and * * * similar crimes * * * *where the conduct in-*

volved presents a serious risk of injury to a person." H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986) (emphasis added). "The provision as finally enacted, however, added" the listed crimes to the pre-existing bill's coverage of any crime that "involves conduct that presents a serious potential risk of physical injury to another." *Taylor*, 495 U.S. at 587 (internal quotation marks omitted).

This drafting sequence suggests that Congress understood what is now the "otherwise" clause to represent a broad and independently operative category, and the legislature then added the listed offenses to remove any doubt about their coverage. See *Taylor*, 495 U.S. at 589 (addition of the enumerated offenses "seemingly was meant simply to make explicit the provision's implied coverage of crimes such as burglary"); *McCall*, 439 F.3d at 971 ("[t]he form of the addition [to the statute] made the 'otherwise involves' provision look like a catchall when in fact it was initially the operative provision," and therefore "it is wrong to infer that Congress intended to limit the 'otherwise involves' provision to offenses that are similar to the enumerated add-ons").

3. The committee hearings that petitioner cites (Pet. Br. 26-27) do not justify the conclusion that Congress implicitly meant to confine the "otherwise" provision to crimes that were "similar" to the listed crimes. Contrary to petitioner's characterization, the hearings were not narrowly focused on "concern[s] for the eruption of violence during a firearm-wielding offender's commission of a property crime as a means of criminal livelihood." *Id.* at 28. On the contrary, the hearings indicate that the Congress that enacted the definition of "violent felony" currently in force was concerned with the "habitual offender," and not only the offender who earns a living by

committing crime for profit, who commits crimes, such as arson, "where the * * * loss of life could be serious." See, *e.g.*, *Armed Career Criminal Legislation: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 8, 12 (1986) (statement of Rep. Wyden).

4. Petitioner emphasizes the House Report's focus on "property" crimes and its reference to crimes "similar" to burglary, arson, extortion, and use of explosives. See Pet. Br. 28 (quoting *Taylor*, 495 U.S. at 587 (quoting H.R. Rep. No. 849, *supra*, at 3)). But the House Report does not indicate that Congress believed that "violent felonies" under its definition would be *limited* to property crimes. To the contrary, the language of the bill covered those crimes as a subset of a broad category, the later addition of those examples did not narrow the more general clause itself, and the only textual yardstick for measuring "similarity" was in relation to the risk of physical injury to another.

When Congress revised the definition of "violent felony" in H.R. 4885 to add explicit references to "burglary, arson, extortion" and "use of explosives," it did not also add limitations to crimes involving property, crimes made more dangerous by the use of firearms, or crimes generally committed as a means of livelihood. This suggests that Congress added the reference to these crimes simply to clarify that they were included in the scope of the "violent felony" definition, see *Taylor*, 495 U.S. at 589, not to change its meaning.

D. The Doctrine Of Constitutional Avoidance Does Not Apply

Petitioner's invocation of the doctrine of constitutional avoidance (Pet. Br. 44-51) fails because petitioner

cannot identify a serious constitutional question that his construction would avoid.

1. Petitioner contends that interpreting the residual provision to call for an inquiry into whether a felony offense presents a "serious potential risk of physical injury" is unconstitutionally vague, and is thus an interpretation to be avoided if fairly possible. But as petitioner acknowledges (Pet. Br. 48), this Court has already rejected the argument that a statutory provision that applies to conduct presenting a "serious potential risk of physical injury" is "so indefinite as to prevent an ordinary person from understanding what conduct it prohibits." *James*, 127 S. Ct. at 1598 n.6; see *ibid.* (noting that "[s]imilar formulations have been used in other federal and state criminal statutes"). An inquiry into the risk posed by the criminal offense in question is, moreover, indisputably what the statute calls for. *Id.* at 1597; accord *id.* at 1602-1603 (Scalia, J., dissenting). There is no fairly possible construction of the statute by which courts might dispense with application of the serious-risk requirement.

It may be true, as petitioner argues (Pet. Br. 48-49), that the serious-risk requirement is easier to apply when the risks of a unlisted offense are comparable to the risks of a closely analogous listed offense, as was the case in *James* itself. But to say that it is *easier* to evaluate the risk of an analogous, comparably risky offense is not to say that it is constitutionally impermissible to apply the serious-risk requirement to a unlisted offense that is not closely analogous to the offenses of burglary, arson, extortion, or explosives use. See *James*, 127 S. Ct. at 1598 n.6. Moreover, that there may be cases that are relatively clear because of the similarity of the offense at issue to the four enumerated offenses does not mean that

petitioner's atextual test attempting to inquire into various dimensions of similarity is easier to administer or less vague than the definition that Congress actually adopted. It is not clear how inquiry into whether crimes are "typically committed by career criminals" as a means of livelihood or are inherently "more dangerous when committed with firearms" will add clarity to the ACCA.

2. Petitioner also argues that the serious-risk requirement violates separation-of-powers principles because evaluating whether a particular offense presents a serious potential risk of physical injury to another allows courts to "defin[e] crimes and fix[] penalties," which are "legislative, not judicial, functions." Pet. Br. 49 (quoting *United States* v. *Evans*, 333 U.S. 483 (1948)). Petitioner's reliance on *Evans* is misguided. In *Evans*, the Court held that, where Congress has defined a crime but failed to prescribe a penalty for its commission, the Court's selection of a penalty from among several plausible possibilities would be purely speculative and therefore "outside the bounds of judicial interpretation." 333 U.S. at 484-485, 495. In this case, by contrast, Congress has defined the crime in question, and it has fixed the penalties for its commission. This case thus does not call on the Court to "plug [a] hole in the statute," *id.* at 487; it calls on the Court to interpret the statute. That is a judicial function.

Nor is determining whether particular conduct presents a serious risk of injury "an essentially legislative judgment." Pet Br. 50 (internal quotation marks and citation omitted). The law often calls for courts to assess risk. As this Court noted in *James*, many federal and state statutes contain "[s]imilar formulations." 127 S. Ct. at 1598 n.6 (citing, inter alia, 18 U.S.C. 2332b(a)(1)(B) (defining "terrorist act" to include conduct that, among

other things, "creates a substantial risk of serious bodily injury to any other person")); see 18 U.S.C. 844(f)(2) (prohibiting malicious destruction of property by fire or explosive and providing penalties where, inter alia, the offense "creates a substantial risk of injury to any person"); 21 U.S.C. 858 (providing criminal penalties where manufacture of a controlled substance "creates a substantial risk of harm to human life"). Statutes that require judicial or jury assessments of the substantiality of risk are also ubiquitous in the States.[19] Determining

[19] All or virtually all States have enacted criminal laws that define reckless endangerment, kidnaping, resisting arrest, or other offenses by using some formulation similar to "serious risk of physical injury." See, *e.g.*, Ala. Code § 13A-6-24(a) (Michie 1975) ("A person commits the crime of reckless endangerment if he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person."); Alaska Stat. § 11.41.300(a)(2)(B) (Lexis/Nexis 1962) ("A person commits the crime of kidnapping if * * * the person restrains another * * * under circumstances which expose the restrained person to a substantial risk of serious physical injury"); *id.* § 11.56.700 (making it a criminal offense to resist arrest by, inter alia, "any means that creates a substantial risk of physical injury to any person"); Ariz. Rev. Stat. Ann. (2001) § 13-1201(A) ("A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury."); *id.* § 13-2508(A)(2) (making it a crime to resist arrest by, *inter alia*, "[u]sing any * * * means creating a substantial risk of causing physical injury to the peace officer or another"); Ark. Code Ann. § 5-11-103(a) (1997) (providing that a person commits first-degree false imprisonment if that person restrains another "in a manner that exposes the other person to a substantial risk of serious physical injury"); *id.* § 5-13-206(a) (providing that a person commits second-degree assault "if he or she recklessly engages in conduct that creates a substantial risk of physical injury to another person"); Cal. Penal Code § 278.6(a)(1)(a) (West 1999) (providing that, in child abduction cases, it is an aggravating factor when "[t]he child was exposed to a substantial risk of physical injury or illness"); Colo. Rev. Stat. § 18-3-208 (2006) ("A person who recklessly engages in conduct which creates a substantial risk of serious bodily injury to

whether the risk presented by defined conduct qualifies as "substantial" or "serious" for purposes of applying such rules is a matter well within the constitutional competence of the judiciary. See, *e.g.*, *Farmer* v. *Brennan*, 511 U.S. 825, 828 (1994) (describing contours of Eighth Amendment claim concerning a prison official's deliberate indifference to a "substantial risk of serious harm"). Nor is it clear why assessing risk is any more inherently legislative than assessing crimes typically committed by career offenders that are more dangerous—*i.e.*, risky—when committed with firearms.

3. Petitioner next suggests (Pet. Br. 49-51) that the ACCA's serious-risk requirement raises Fifth and Sixth Amendments concerns under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny. The Court has already rejected this argument. As the Court has noted, whether a felony offense qualifies as a "violent felony" under the ACCA is a legal question, not a factual one. *James*, 127 S. Ct. at 1600. A court applying *Taylor*'s categorical approach does not assess any facts specific to a petitioner's prior conviction, but rather looks to the elements of the crime of conviction to determine whether they satisfy the requirements of the ACCA. That inquiry raises no constitutional doubts under *Apprendi*. *Ibid.*

E. The Rule of Lenity Does Not Apply

Contrary to petitioner's argument (Pet. Br. 51-53), the rule of lenity does not apply in this case. That rule is "reserved for cases" involving a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello*, 524 U.S. at 138-139 (internal quotation

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another person commits reckless endangerment.").

marks and citations omitted). Rule of lenity concerns are particularly attenuated when the sentencing provision in question does not regulate primary conduct, but instead speaks only to the proper legal classification of convictions that an offender has already sustained and whose status will be determined by a court, rather than as a matter of prosecutorial discretion.

Petitioner does not identify any particular language in the statute that he claims is ambiguous. He instead contends (Pet. Br. 53) that his own arguments for engrafting a series of atextual limitations on the reach of the ACCA create "ambiguity * * * whether [driving while intoxicated] is a 'violent felony.'" That bootstrap will not work. Petitioner only seeks to create ambiguity that is absent in the plain meaning of the words Congress wrote. Petitioner's convictions for felony DUI constitute convictions for an offense "involv[ing] conduct that presents a serious potential risk of physical injury" to others, 18 U.S.C. 924(e)(2)(B)(ii). They therefore qualify as predicate offenses under the ACCA.

F. Petitioner's Felony DUI Convictions Are Crimes "Punishable By Imprisonment For A Term Exceeding One Year"

Petitioner alternatively contends (Pet. Br. 37-41) that his felony DUI convictions, even if they qualify as presenting the requisite risk of harm, do not qualify for sentencing under the ACCA because those convictions do not meet the requirement for a "violent felony" that an offense be "punishable by imprisonment for a term exceeding one year." 18 U.S.C. 924(e)(2)(B). Petitioner raised this issue in passing in the district court (J.A. 21-22), and the district court rejected the contention (J.A. 48 n.2). The issue was not raised by petitioner in the court of appeals, discussed in the court of appeals' opin-

ion, or mentioned in the petition for certiorari, although the question presented in the petition appears to be broad enough to encompass the issue.

Regardless of whether the question is properly presented for plenary review here, petitioner's claim is identical in substance to the issue on which this Court granted certiorari in *United States* v. *Rodriquez*, No. 06-1646 (to be argued Jan. 15, 2008). As the government explained in its brief in *Rodriquez* (a copy of which is being served on petitioner), for purposes of the ACCA, the relevant "maximum term of imprisonment" for a repeat offender is the maximum sentence prescribed by law for recidivists. Here, petitioner's ACCA sentences rest on his fourth (and successive) convictions for a New Mexico DUI offense. Under New Mexico law, the fourth and each subsequent conviction constitutes a felony. N.M. Stat. Ann. § 66-8-102(G). For the reasons explained in the government's brief in *Rodriquez*, petitioner's attempt to claim the lower "maximum" punishment applicable to first-, second-, and third-time DUI offenders lacks merit, and his felony convictions are punishable by more than one year of imprisonment, as the ACCA requires. Indeed, if petitioner's contention were correct, it would lead to the paradoxical situation in which the "maximum term of imprisonment" for petitioner's repeat-offender crimes would be lower than the terms of imprisonment that petitioner actually received. Petitioner identifies no valid basis for attributing that bizarre result to the statute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 2007

APPENDIX

1. 18 U.S.C. 922(g)(1) provides in pertinent part:

Unlawful acts

* * * * *

(g) It shall be unlawful for any person—

* * * * *

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[,]

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * * *

2. 18 U.S.C. 924(e) provides in pertinent part:

Penalties

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

* * * * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, * * * that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

* * * * *

3. N.M. Stat. Ann. 31-18-15(A) (Michie 2002) provides in pertinent part:

Sentencing authority; noncapital felonies; basic sentences and fines; parole authority; meritorious deductions.

If a person is convicted of a noncapital felony, the basic sentence of imprisonment is as follows:

* * * * *

(6) for a fourth degree felony, eighteen months imprisonment.

* * * * *

4. N.M. Stat. Ann. 66-8-102 (Michie 2002) provides in pertinent part:

Person under the influence of intoxicating liquor or drugs; aggravated driving while under the influence of intoxicating liquor or drugs; penalty.

A. It is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle within this state.

* * * * *

C. It is unlawful for any person who has an alcohol concentration of eight one-hundredths or more in his blood or breath to drive any vehicle within this state.

* * * * *

E. Every person under first conviction under this section shall be punished * * * by imprisonment for not more than ninety days or by a fine of not more than five hundred dollars ($500), or both * * *.

F. A second or third conviction under this section shall be punished * * * by imprisonment for not more than three hundred sixty-four days or by a fine of not more than one thousand dollars ($1,000), or both * * *.

* * * * *

G. Upon a fourth or subsequent conviction under this section, an offender is guilty of a fourth degree felony, as provided in Section 31-18-15 NMSA 1978, and shall be sentenced to a jail term of not less than six months, which shall not be suspended or deferred or taken under advisement.

* * * * *

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No. 06-11543 11-13-07

IN THE

Supreme Court of the United States

LARRY BEGAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the rule of lenity contribute to a conclusion that the crime of driving while intoxicated is not a "violent felony" for purposes of triggering a 15-year mandatory minimum sentence under the Armed Career Criminals Act?

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IN THE

Supreme Court of the United States

No. 06-11543

LARRY BEGAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Families Against Mandatory Minimums Foundation (FAMM) is a national, nonprofit, nonpartisan organization of 13,000 members founded in 1991.

[1] Pursuant to Rule 37.6, Amicus Curiae certify that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

FAMM's primary mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform.

FAMM promotes sentencing policies that give judges discretion to distinguish among defendants and to sentence them according to their role in the offense, the seriousness of the offense, the potential for rehabilitation and the characteristics of the offender. In short, FAMM believes the punishment always must fit the crime. FAMM's vision is a nation in which sentencing is individualized, humane, and sufficient but not greater than necessary to impose just punishment, secure public safety, and support successful rehabilitation.

Petitioner Begay's case—that of a man never convicted of a crime of violence against another person or property and yet sentenced as an "armed career criminal" to a mandatory minimum sentence of fifteen years—exemplifies what FAMM urges is wrong with mandatory minimum sentencing, in general, and with the Armed Career Criminals Act, in particular. FAMM's interest in the instant case derives from its conviction that, to the extent mandatory minimums are required by law, they must punish no one other than whom the legislature intended and only to the extent the law provides.

Amicus Curiae files this brief in support of Petitioner Begay because his case raises an important question of statutory interpretation regarding the proper construction of the term "violent felony" under

the Armed Career Criminals Act (ACCA), 18 U.S.C. § 924(e). The proper interpretation of "violent felony" under the ACCA may ultimately turn upon the application of the rule of lenity. Amicus Curiae offers its view as to the role the rule of lenity should play in the resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Larry Begay is a middle-aged Navajo. He has a serious drinking problem, as his driving record attests. Yet he has never been convicted of a violent crime against any person or property, and he certainly has not made a "career" out of crime. However, after police found him in possession of an unloaded gun, he was convicted under the ACCA and sentenced to 188 months as an "armed career criminal." Amicus Curiae supports Petitioner's contention that the type of felony for which he was previously convicted, driving while intoxicated (DWI), is not a "violent felony" as defined in the "otherwise" clause of the Armed Career Criminals Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii).[2] As Petitioner forcefully argues, inclusion of DWI convictions as "violent felonies" is inconsistent with the language and purpose of the ACCA, is contrary to well-established canons of statutory construction, and is not in keep-

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[2] The ACCA defines a "violent felony," in pertinent part, as "any crime punishable by imprisonment for [more than] one year . . . that . . . (i) has as an element the use, attempted use, or threatened use of physical force against . . . another . . . or . . . (ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B). The italicized portion of the statute is commonly referred to as the ACCA's "otherwise" clause.

ing with either common sense or Congressional intent.

Were the Court to find, however, that neither the plain text of the ACCA, nor the text as construed using relevant canons of construction, excludes DWI as a "violent felony," the Court should conclude that the ACCA's use of the term "violent felony" is ambiguous. The resulting ambiguity would in that circumstance invite application of the rule of lenity, resulting in construction of the ACCA in Petitioner's favor. This brief focuses on that possibility, and thus on the rule of lenity.

Amicus Curiae believes that application of the rule of lenity may be warranted in this case for several reasons. *First*, while the statutory language, when viewed in its proper context, precludes inclusion of DWI as a "violent felony," there is, at a minimum, a lack of textual clarity as to what criminal offenses fall within the sweep of the ACCA's "otherwise" clause. This Court, like the Tenth Circuit below, has in effect acknowledged this lack of clarity. This alone justifies application of the rule of lenity.

Second, two well-established textual canons of statutory construction, *noscitur a sociis* and *ejusdem generis*, support Petitioner's position that DWI is not a "violent felony" under the ACCA. DWI does not resemble any of the property crimes specifically listed in Section 924(e)(2)(B)(ii)—burglary, arson, extortion and the use of explosives—all of which involve not merely a significant risk of danger to other persons but also an intent to injure or violate another's property interests. At the least, these familiar tools of statutory construction preclude a finding that the government's interpretation of the "otherwise" clause is the only reasonable one. That two or more plau-

sible but conflicting interpretations of the statute exist triggers resort to the rule of lenity.

Third, the ACCA's legislative history reveals that Congress crafted the "otherwise" clause to cover *property* crimes similar to those specifically enumerated in § 924(e)(2)(B)(ii). DWI is not a property crime. Nor is it a crime of a type that is in any other essential way similar to those that Congress chose to list. Accordingly, there is no risk that the rule of lenity would here produce a result inconsistent with Congressional intent.

Fourth, Amicus Curiae contends that the term "violent felony" as used in the ACCA must be construed in accordance with common sense. A common-sense approach helps to ensure that the government provides "fair notice" of the consequences associated with criminal conduct, in language the citizenry will understand. Fair notice is a concept rooted deeply in this country's jurisprudence, and it is one that anchors the rule of lenity. The government's insistence that DWI is a violent felony does not comport with a common-sense reading of the statute, and it fails to provide fair notice.

In short, employing the rule of lenity is particularly apt in this case given the ACCA's potential ambiguity and the grave consequences associated with impermissibly construing that ambiguity against the Petitioner—as the facts of Petitioner's case remind us. The rule of lenity ensures that the Petitioner will not be forced to suffer the draconian consequences that flow from Congressional lack of clarity. This case provides an exemplary vehicle for the Court to provide guidance about proper application of the rule of lenity and about construction of the term "violent felony" under the ACCA.

ARGUMENT

I. PETITIONER'S CONSTRUCTION OF THE ACCA'S "OTHERWISE" CLAUSE IS CORRECT.

Amicus Curiae does not believe the term "violent felony" in 18 U.S.C. § 924(e) is necessarily ambiguous. A "violent felony," if given its common meaning, connotes an offense carrying *scienter*[3] that results in, or poses a strong risk of, active violence directed at either other persons or property. The statute's definition of "violent felony" supports that commonsense interpretation in that it targets certain serious completed or attempted crimes against persons, as well as specific crimes against property raising the strong risk of bodily injury (i.e., burglary, arson, extortion, and those involving the use of explosives). Petitioner's interpretation is also supported by the statute's title (the Armed Career Criminals Act) and its purpose (to punish career criminals who commit dangerous offenses involving a firearm). One might obscure the meaning of "violent felony" only by construing it out of context against the open-ended "otherwise" clause of the ACCA, which makes room for additions to the types of criminal conduct governed by the Act.

Seizing on the "otherwise" clause in isolation, the government argues that DWI is a "violent felony" under the ACCA because it is a crime that arguably "involves conduct that presents a serious potential risk of physical injury to another." The government's interpretation ignores the words introducing and

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[3] As Petitioner points out, DWI in New Mexico does not even require a showing of a *mens rea*, much less criminal *scienter*. *See* Pet. Br. at 30-31, 36-37.

surrounding the "otherwise" clause, as well as the statute's very purpose.

Petitioner's reading of the statute, whereby felony DWI is not a "violent felony," is more persuasive. Not only is Petitioner's interpretation in keeping with the language of the statute as well as its purpose, but it is consistent with well-established canons of statutory construction. The "otherwise" clause follows an enumeration of specific crimes—burglary, arson, extortion, and crimes that involve the use of explosives. The familiar textual canons of *noscitur a sociis* and *ejusdem generis* teach that where words are grouped together, their meaning can be discerned by examining others within the group, and where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those set forth by the preceding specific words. *See Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384-85 (2003).

A straightforward interpretation of "violent felony" in the ACCA rules out crimes, such as DWI, that require no proof of *scienter* and that are not active, violent offenses directed at the person or property of another. The Tenth Circuit held otherwise, albeit in a decision that generated three separate opinions. The fractured decision suggests, at a minimum, that there are at least two plausible ways in which to interpret the "otherwise" clause—one dictating the result urged by the Petitioner, the other yielding the much harsher result advocated by the government. The ACCA penalty clause, as applied to cases such as Petitioner's, thus suffers from a "grievous ambi-

guity." *Muscarello v. United* States, 524 U.S. 125, 138 (1998).

In such circumstances, as explained below, the rule of lenity should be applied to construe the ACCA in Petitioner's favor.

II. IF THE ACCA'S USE OF "VIOLENT FELONY" IS AMBIGUOUS, THE RULE OF LENITY SHOULD PRECLUDE THE TENTH CIRCUIT'S UNDULY BROAD AND HARSH INTERPRETATION.

Petitioner's brief ably demonstrates that the ACCA must be construed in his favor given the statute's text and purpose. Amicus Curiae therefore takes this opportunity to expand on a supplemental rationale for finding in Petitioner's favor, one briefly advanced by Petitioner's opening brief—the rule of lenity. *See* Pet. Br. 51-53.

A. The Rule Of Lenity Is Applied To Construe Penal Statutes In A Defendant's Favor Where The Statute Is Ambiguous.

The rule of lenity provides that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 348 (1971). Or, in the context of determining the proper punishment under a statute, "Where it is doubtful whether the text includes the penalty, the penalty ought not be imposed." *United States v. R.L.C.*, 503 U.S. 291, 309 (1992). (Scalia, J., concurring); *see also Commissioner v. Acker*, 361 U.S. 87, 91 (1959) (stating that "one is not to be subject to a penalty unless the words of the statute plainly impose it") (internal quotations omitted). Indeed, the

rule of lenity applies with equal force to penalty statutes as to laws defining the crime itself. *Bifulco v. United States*, 447 U.S. 381, 401-02 (1998) (Burger, C.J., concurring).

The rule of lenity is called "venerable" because of its age and the respect it commands.[4] *See R.L.C.*, 503 U.S. at 305. Blackstone commented on the vigorous role it played in limiting criminal punishment in sixteenth- and seventeenth-century English courts. William Blackstone, *Commentaries on the Laws of England* 88. He described the rule as one of strict construction: "Penal statutes must be construed strictly." *Id.*

Lenity has profound implications for the interpretive process because it derives from the principle of legality itself—*nulla poena sine lege* ("there can be no punishment without law"). *See generally* Herbert L. Packer, *The Limits of the Criminal Sanction* 93 (1968) (describing the rule of lenity and the vagueness doctrine as "devices worked out by the courts to keep the principle of legality in good repair"); *see*

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[4] The rule of strict construction—now known as the rule of lenity—emerged in American courts in *United States v. Wiltberger*, 18 U.S. 76 (1820), in which the government sought an expansive interpretation of a penal statute. Chief Justice John Marshall, writing for the Court, rejected the government's approach and instead adhered to the rule of strict construction, explaining that the rule's underlying policies required a narrow, consistent interpretive approach to penal statutes: "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Id.* at 95.

Rogers v. Tennessee, 532 U.S. 451, 467-68 (2001) (Scalia, J., dissenting) (noting that "the maxim *nulla poena sine lege* . . . 'dates from the ancient Greeks' and has been described as one of the most 'widely held value-judgments in the entire history of human thought'") (brackets omitted); *see also Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (stating that enforcement of overly vague criminal statutes "violates the first essential of due process of law"). Whether courts explicitly call on the rule or not, they all recognize that the principles underlying the maxim—consistency and fairness in the application of criminal law—are bedrock.

The Court has recognized that the rule of lenity serves three fundamental purposes: "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Each of these goals is essential to the proper functioning of our criminal justice system.

The first purpose, to ensure fair notice, arises from the general principle that warning must be given "to the world in language that the common world will understand." *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle*, 283 U.S. at 27). In *McBoyle v. United States*, 283 U.S. 25 (1931), Justice Oliver Wendell Holmes emphasized how the rule of lenity serves fair notice, even though courts agree that most defendants do not actually read the United States Code:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair

> warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."

Id. at 27. Justice John Marshall Harlan II reiterated this particular point thirty-five years later, when he explained, "The policy thus expressed [by the rule of lenity] is based primarily on a notion of fair play: in a civilized state the least that can be expected of government is that it express its rules in language all can reasonably be expected to understand." *United States v. Standard Oil Co.*, 384 U.S. 224, 236 (1966) (Harlan, J., dissenting). That underlying purpose remains vital to this day, given that fair notice is "required in any system of law." *See United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring). Indeed, as noted above, fair notice is closely tied to the principle of legality itself.

Two important results flow from the need for fair notice. First, a premium is placed on the common-sense meaning of a statute. *See, e.g.*, *McBoyle*, 283 U.S. at 27. It is inherently unfair to impose on "the common world" a statutory interpretation that is overly obscure or clever. Second, a premium is put on the text of the statute itself. Judges should not rely on extratextual considerations to construe an unclear criminal statute against a defendant. As this Court noted, "[b]ecause construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon v. United States*, 494 U.S. 152, 160 (1990).

Lenity's second core purpose is to preserve the respective powers of the separate branches of government. *See Bass*, 404 U.S. at 348. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Id.* *See also United States v. Granderson*, 511 U.S. 39, 68-69 (1994) (Kennedy, J., concurring) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think, perhaps along with some Members of Congress, is the preferred result. . . . This admonition takes on a particular importance when the Court construes criminal laws.") (internal citations omitted). Lenity impedes punishments that are not clearly authorized by Congress, the only branch of government competent to establish criminal penalties.

The third purpose served by the rule of lenity is to avoid arbitrariness and inconsistency in the enforcement of criminal statutes. *See Kozminski*, 487 U.S. at 952. The rule of lenity responds to this need by "fostering uniformity in the interpretation of criminal statutes." *Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). It fosters uniformity because, in every case of criminal statutory interpretation, it calls on courts to examine the governing text for ambiguity and to resolve any such ambiguity in the defendant's favor. *See generally id*; *Crandon*, 494 U.S. at 175-78 (Scalia, J., concurring); William N. Eskridge, Jr., *Formalism and Statutory Interpretation*, 66 U. Chi. L. Rev. 671, 678-79 (1999) (suggesting that adherence to the rule of lenity could "generate greater objectivity and predictability in statutory interpretation"). Faithfully applied, the rule of lenity prevents the sovereign

from punishing individuals based on an innovative or creative interpretation of ambiguous criminal statutes.

The Court applies the rule of lenity as the determining tool of construction when review of the language and legislative history of a criminal statute do not resolve the ambiguity surrounding the statute's appropriate meaning and application. As the Court noted in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definitive language." *Id.* at 409 (alteration omitted) (quoting *McNally v. United States*, 483 U.S. 350, 359-60 (1987)); *Castillo v. United States*, 530 U.S. 120, 131 (2000); *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion) (when "ambiguity survives," the Court "choos[e]s the construction yielding the shorter sentence by resting on the venerable theory of lenity"); *Moskal v. United States*, 498 U.S. 103, 108 (1990) (the rule of lenity applies where the text, structure and history of a penal statute leave reasonable doubt about the statute's intended scope).

As demonstrated below, the rule of lenity should have been applied in this case, and by all courts of appeals, to construe the "otherwise" clause of the ACCA. The rule of lenity compels the conclusion that DWI is not a "violent felony" for purposes of the ACCA.

B. ACCA's "Otherwise" Clause Is, In The Most Generous Light, Susceptible To Two Plausible Constructions.

As explained above, Petitioner's reading of the term "violent felony" under the ACCA provides the best and most natural interpretation of the statute in light of its language, structure, and purpose. Nonetheless, the fact that the ACCA has caused confusion in the courts, and the fact that this Court is being asked yet again to provide guidance on its meaning,[5] strongly suggests that the definition of "violent felony" set forth in the statute is susceptible to at least two competing and linguistically plausible interpretations.

1. *Controversy within and among courts shows that ACCA is capable of more than one textual interpretation.*

Section 924(e)(2)(B)(ii) does not define which offenses are and are not included within the "otherwise" clause. The dissenting opinion for the Tenth Circuit recognized as much when it noted that the language of § 924(e) is "anything but 'plain.'" *United States v. Begay*, 470 F.3d 964, 979 (10th Cir. 2006) (McConnell, J., dissenting).[6] In *James v. United*

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[5] The ACCA's lack of clarity is demonstrated by this Court's recent docket. *See Shepard v. United States*, 544 U.S. 13 (2005), *Taylor v. United States*, 495 U.S. 575 (1990); *James v. United States*, 127 S.Ct. 1586 (1996); *United States v Rodriguez*, 464 F.3d 1072, *cert. granted*, ___ S. Ct. ___, 2007 WL 1700499 (Sept. 25, 2006) (No. 06-1646).

[6] Indeed, even Judge Hartz writing for the majority of the court did not find the language of the statute unambiguous. Rather, he wrote that it was his view that the "natural"

States, 127 S.Ct. 1586 (2007), Justice Scalia similarly acknowledged that: "The residual provision of clause (ii) of ACCA's definition of violent felony—the clause that sweeps within ACCA's ambit any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another"—is, to put it mildly, not a model of clarity." *Id.* at 1602 (Scalia, J., dissenting). Moreover, the *James* majority used tools of statutory construction to find that attempted burglary poses the same risk as burglary, indicating that the majority did not find the statutory language clear on its face. Justice Scalia went further to suggest that the Court's decision "permits an *unintelligible* criminal statute to survive uncorrected, unguided and unexplained." *Id.* at 1610 (emphasis added). It is this lack of clarity that makes lenity relevant.

The lack of clarity identified above has generated two, competing constructions of the ACCA's "otherwise" clause. Under what has been coined the "all crimes" interpretation, advocated by the government, a "violent felony" includes all crimes, regardless of their nature, that involve conduct presenting a serious potential risk of physical injury to another. The Tenth Circuit, along with two other courts of appeals, adopted the "all crimes" approach and held felony DWI to be a "violent felony" within the meaning of the ACCA. *See Begay*, 470 F.3d at 974-75; *United States v. McCall*, 439 F.3d 967 (8th Cir. 2006) (en banc); *United States v. Sperberg*, 432 F.3d 706 (7th Cir. 2005).

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meaning of the statute covered Begay's circumstances. *Begay*, 470 F.3d at 973.

In contrast, Petitioner urges the "similar crimes" interpretation, whereby the general phrase "otherwise" denotes conduct that is "similar to" the enumerated crimes of burglary, arson, extortion, and crimes using explosives and that presents a serious potential for physical injury to another.[7] Judge McConnell adopted this interpretation in his dissent for the Tenth Circuit Court of Appeals. *Begay*, 470 F.3d at 980 (McConnell, J., dissenting). This Court lent support to the "similar crimes" approach in *James*, noting, "The specific offenses enumerated in clause (ii) provide one baseline from which to measure whether other *similar conduct* 'otherwise . . presents a serious potential risk of physical injury.' In this case, we can ask whether the risk posed by attempted burglary is comparable to that posed by its closest analogue among the enumerated offenses—here, completed burglary." *James*, 127 S.Ct. at 1594 (citation omitted) (emphasis added). Justice Scalia's dissenting opinion in *James* provides further support for the "similar crimes" interpretation advanced by Petitioner. *James*, 127 S.Ct. at 1603 (Scalia, J., dissenting) ("[T]he enumerated crimes are examples of what Congress had in mind under the residual provision, and the residual provision should be interpreted with those examples in mind.").

Finally, the Eighth Circuit, in *United States v. Walker*, adopted a "similar crimes" interpretation in a substantially similar context. In *Walker*, the court of

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[7] The "similar crimes" and "all crimes" labels were first adopted in *United States v. McCall*, 439 F.3d 967, 977, n. 8 & n. 9 (8th Cir. 2006) (en banc), they were used in the dissent below, *United States v. Begay*, 470 F.3d 964, 979 (10th Cir. 2006), and they were referenced in the Brief of the United States in Opposition to Certiorari at 13-14.

appeals construed the term "crime of violence" as used and defined under the United States Sentencing Guidelines. The term "crime of violence" under the Guidelines is defined identically to the term "violent felony," as it appears in 18 U.S.C. § 924(e)(2)(B), aside from the Guideline's addition of the phrase "of a dwelling" after the word "burglary." *United States v. Walker*, 393 F.3d 819 (8th Cir. 2005), *overruled by United States v. McCall*, 439 F.3d 967 (8th Cir. 2006) (en banc).

As Petitioner has explained, the "similar crimes" approach comports with the language of the ACCA.[8] It is also in keeping with the statute's purpose. Each of the enumerated crimes involves violent, aggressive conduct that criminals may adopt as a means of making their living, and each of the crimes are made more dangerous when committed with a firearm. The "otherwise" clause was not meant to sweep up offenses, like DWI, that are not similar to the enumerated offenses in these ways. And, in fact, the government does not appear to seriously contend that DWI *is* similar to the enumerated offenses in *any* of these ways.

But even if Petitioner's textual interpretation is not accepted outright, the "otherwise" clause's susceptibility to competing interpretations that produce profoundly different sentencing outcomes compels application of the rule of lenity. This is especially so where familiar canons of statutory construction and

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[8] Petitioner's interpretation of the "otherwise" provision is the only reading that keeps intact the remainder of § 924(e)(2)(B) because, under the government's reading, the residual clause would swallow the crimes against persons described in part (i), as well as the specifically enumerated property offenses listed in part (ii) of that subsection.

the ACCA's legislative history do not reveal any clear Congressional intent that would support the government's position. If anything, these interpretive tools strongly support Petitioner.

2. *Familiar canons of statutory construction support Petitioner's interpretation.*

Two cardinal textual canons support the "similar crimes" interpretation of the ACCA.[9] These canons are applied by courts as elementary rules of thumb for reading statutes as they were meant to be read. Because they act as a backdrop against which Congress legislates, they provide an additional means of discerning Congressional intent.

The first such canon is *noscitur a sociis*, which provides that "a word is known by the company it keeps." This rule is typically applied to a general term that "is capable of multiple meanings in order to avoid the giving of unintended breadth to the acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). In the ACCA's case, the canon directs that the "otherwise" clause be limited to

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[9] Petitioner's interpretation also finds support in the maxim that courts should, whenever possible, avoid construction of statutes that render any section mere surplusage. *See Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994). As the dissenting opinion below noted, interpreting the "otherwise" clause as the government argues would render the word "otherwise" irrelevant. The creative argument made by some that the term "otherwise" is not redundant because it signifies that the residual clause is reserved for crimes that are *different from* the enumerated property crimes that come before it simply reinforces the view that the statute is ambiguous and, thus, that this is a case in which the rule of lenity should apply.

include only those offenses that are related to the previous listed offenses.

The second canon germane to this case is *ejusdem generis*, which means that "[w]here general words follow specific words in a statute, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). This canon also indicates that the crimes listed before the "otherwise" clause are illustrative of the crimes covered by the clause.

Under these venerable principles, the ACCA's "otherwise" clause does not extend to DWI and other crimes that are conceptually dissimilar to the enumerated property crimes of burglary, arson, extortion, and use of explosives. At the very least, fidelity to these canons raises serious doubts about the legitimacy of the government's interpretation of the "otherwise" provision. Those doubts require resort to the rule of lenity.

C. The ACCA's Legislative History Does Not Support The Government's "All Crimes" Interpretation.

Application of the rule of lenity does not risk any inconsistency with Congress's intent. The government's "all crimes" interpretation of the ACCA finds no clear support in the statute's legislative history. Rather, the ACCA's legislative history supports Petitioner's interpretation of the "otherwise clause."[10]

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[10] The Court has gone back and forth about whether the rule of lenity should play a role in statutory interpretation before or

As this Court acknowledged just last term, the ACCA's legislative history reveals that § 924(e)(2)(B)(ii) was crafted to cover *property* crimes that carry "a significant risk[] of bodily injury or confrontation that might result in bodily injury." *James v. United States*, 127 S. Ct. 1586, 1592 (2007). This *James* Court cited with approval legislative history that specifically ties the property crimes intended to be covered by § 924(e)(2)(B)(ii)'s "otherwise" clause to the enumerated crimes of burglary, arson, extortion, and use of explosives:

> The other major question involved in these hearings was as to what violent felonies involving physical force against property should be included in the definition of "violent felony." The Subcommittee agreed to add the crimes punishable for a term exceeding one year that involve conduct that presents a serious potential risk of physical injury to others. This will add State and Federal crimes against property such as burglary, arson, extortion, use of explosive *and similar crimes* as predicate offenses where the conduct involved presents a serious risk of injury to a person.

127 S.Ct. 1586, 1592-93 (2007) (citing H.R. Rep. No. 99-849, at 3 (1986) (emphasis added).

DWI felonies are *not* property crimes. Nor are they similar to the crimes of burglary, arson, extortion, or use of explosives in terms of their mental state, motive, or inherent risks of confrontation or bodily injury.

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after recourse to legislative history. *See R.L.C.*, 503 U.S. at 306 n.6 (plurality opinion).

The legislative history thus supports Petitioner's advancement of Section 924(e)'s "similar crimes" interpretation. By contrast, the Act's history fails to support the government's notion that Congress intended for all crimes presenting any risk of injury—even those conceptually distinct from burglary, arson, extortion, and use of explosives—to be subsumed within the "otherwise" clause. Even Judge Hartz, writing for the Tenth Circuit in this case, acknowledged that the statute's "ambiguous history is not particularly persuasive either way." *Begay*, 470 F.3d at 974. Given the ambiguity, the rule of lenity mandates adoption of the interpretation that favors the criminal defendant—here, the only construction that does not subject persons with prior DWI convictions to draconian punishment.

D. Petitioner's Interpretation Comports With Common Sense.

A fundamental purpose of the rule of lenity is to ensure that the government provides "fair notice" of the consequences associated with criminal conduct "'to the world in language that the common world will understand.'" *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). In keeping with that fundamental notion of fairness, penal statutes should be interpreted with common sense in mind.

The government's sweeping "all crimes" interpretation is not sensible and would produce absurd conclusions. Under Indiana law, for example, an individual's third conviction for prostitution constitutes a Class D felony with a potential sentence of up to three years. *See* Indiana Code § 35-45-4-2 and § 35-50-2-1. Applying the "all crimes" approach could

compel a finding that that felony prostitution constitutes a "violent felony" under the ACCA because it involves conduct that presents a serious potential risk of physical injury to another, given that those who engage in such conduct may have a heightened risk of infecting others with potentially deadly sexually transmitted diseases. As with DWI, there is no evidence that Congress intended to bring within the ambit of "violent felonies" crimes such as prostitution.

However wrongful, DWI, like felony prostitution, shares none of the common attributes of the predicate crimes that Congress identified in the ACCA as warranting imposition of dramatically increased sentences for firearm violations under 18 U.S.C. § 922(g). The government's "all crimes" interpretation would fold within the ACCA's coverage crimes that are not, by their nature, violent. This is the opposite of common sense. Petitioner's interpretation more closely matches the common-sense understanding of the terms used in the statute, thereby providing the kind of fair notice that is so central to the rule of law, generally, and to criminal jurisprudence, in particular.

E. The Rule of Lenity Should Be Applied To Exclude Felony DWI To Prevent A Draconian Result In This Case.

If the Court were to find—after resort to traditional tools of statutory construction—that "violent felony," as used in ACCA, does not definitively capture DWI felonies, the rule of lenity applies. *See, e.g.*, *Cleveland v. United States*, 531 U.S. 12, 25 (2000) ("[T]o the extent that the word 'property' is ambiguous as placed in [the mail fraud statute], we

have instructed that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'") (citation omitted). Much like this case, the Court in *Cleveland* was construing a statute—the mail fraud statute, 18 U.S.C. § 1341—that enumerated a category of predicate offenses. This Court concluded, "In deciding what is 'property' under [the mail fraud statute], we think 'it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *Id.* (citation omitted).

The same result follows here. This Court has warned about the evil of "men languishing in prison unless the lawmaker has clearly said they should." *Bass*, 404 U.S. at 348 (citation omitted). The statute at issue, if misconstrued, illustrates that potential for evil, particularly as applied to the facts of Petitioner's case. The ACCA warrants a mandatory minimum sentence of 15 years' imprisonment under 18 U.S.C. § 924(e)(1). Before courts enhance a criminal's sentence based on previous convictions for felony DWI, Congress must be clear that the statute demands such a result.

The rule of lenity is fundamentally a rule of judicial restraint. The purpose of any penal statute is to punish wrongdoers. Prosecutors, and even sometimes judges, interpreting such statutes may be tempted to stretch their reach. *See United States v. Wiltberger*, 18 U.S. 76, 96 (1820); *Moskal v. United States*, 498 U.S. 103, 132 (1990) (Scalia, J., dissenting) ("The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted."). The rule of lenity counteracts this temptation by requiring courts to hew to statutory text, eschew arguments based on general policies, place a pre-

mium on commonsense, and resolve any ambiguity in the defendant's favor. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85 (1976) (Rehnquist, C.J.,) ("doubts are resolved in favor of the defendant"); *Bifulco v. United States,* 447 U.S. 381, 401-02 (1998) (Burger, C.J., concurring) (indicating that the rule of lenity respond to "[our] temptation to exceed our limited judicial role and do what we regard as the more sensible thing").

CONCLUSION

If the natural reading of a statute favors a criminal defendant, as Petitioner has persuasively shown, that meaning must be adopted. When the statutory meaning is less than clear, moreover, the rule of lenity mandates adoption of the most lenient, reasonable interpretation of the statute. As applied to the ACCA, the rule of lenity compels that the term "violent felony" be construed so as not to include DWI offenses.

Amicus Curiae respectfully requests that the Court reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

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IN THE

Supreme Court of the United States

LARRY BEGAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

Is felony driving while intoxicated a "violent felony" for purposes of the Armed Career Criminal Act?

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INTEREST OF *AMICUS CURIAE*

The National Association of Federal Defenders ("NAFD")[1] is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of the Federal Defender Offices from across the country. The NAFD was formed in 1995 to enhance the representation provided under the Criminal Justice Act and the Sixth Amendment of the United States Constitution. One of the NAFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

Pursuant to the Criminal Justice Act, attorneys in the NAFD have been appointed by the federal courts to represent numerous indigent defendants. The NAFD thus has a strong interest in ensuring that these defendants do not have their statutory minimum or maximum sentences raised unconstitutionally. As the institutional defenders for indigent defendants, the NAFD has extensive experience with the statutory and constitutional issues involved in interpreting 18 U.S.C. § 924(e)(2)(B)(ii). The NAFD is particularly well positioned to anticipate on a practical level how differing interpretations of this statute will affect indigent defendants.

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[1] Pursuant to Rule 37.6, counsel for the NAFD states that no counsel for a party authored this brief in whole or in part and that no person, other than the NAFD, its members, or counsel, made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

The Tenth Circuit's "all crimes" interpretation of the Armed Career Criminal Act's ("ACCA") "otherwise" clause in 18 U.S.C. § 924(e)(2)(B)(ii) is completely standardless.[2] It neither ties the language of the "otherwise" clause to the statutory language that precedes it, nor otherwise cabins its reach through accepted methods of statutory construction. By adopting this standardless approach, the "all crimes" interpretation allows, if not requires, judges to rely on conjecture and personal belief regarding the degree of risk posed by entire categories of criminal offenses.

The broad and conflicting case law resulting from this approach makes clear that the "all crimes" interpretation forces courts to make unguided policy decisions. The breadth of the approach is reflected by the breathtaking range of unenumerated offenses that the lower courts have deemed to be "violent felonies," including failure to report to county jail and unarmed theft of a bicycle. Moreover, circuit splits have emerged over which crimes fall within the "otherwise" clause's ambit, sowing further confusion. Accordingly, the Tenth Circuit's standardless interpretation implicates at least three serious constitutional questions: the void-for-vagueness doctrine, the trial rights guaranteed by the Fifth and Sixth Amendments, and the separation-of-powers doctrine.[3]

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[2] The "otherwise" clause specifically encompasses the following language in 18 U.S.C. § 924(e)(2)(B)(ii): "otherwise involves conduct that presents a serious potential risk of physical injury to another."

[3] NAFD also agrees with *amicus curiae* Brief of Families Against Mandatory Minimums that the rule of lenity applies.

First, the Tenth Circuit's interpretation implicates the void-for-vagueness doctrine because nothing in the language or structure of the "otherwise" clause, standing alone, provides guidance sufficient to put an ordinary person on notice that felony driving while intoxicated ("DWI") is a violent felony that triggers the ACCA's severe penalty. Indeed, the notice problem is exacerbated in Petitioner's case because New Mexico law is clear that felony DWI is not a "felony" for purposes of the State's habitual offender statute. The Tenth Circuit's interpretation also authorizes and encourages arbitrary enforcement because it lacks standards. Judges are required to make speculative decisions about the potential risk of various offenses based on guesswork and their own prejudices and beliefs.

Second, the "all crimes" interpretation threatens the trial rights guaranteed by the Fifth and Sixth Amendments. In *Apprendi* v. *New Jersey*, this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). Here, the court below went beyond merely taking judicial notice of the fact of Petitioner's prior felony DWI convictions. It independently found that the conduct involved in that category of offense "presents a serious potential risk of physical injury to another," a fact that is neither in the statutory definition of the elements of the offense, nor in the case law interpreting felony DWI in New Mexico. As Justice Thomas has observed, allowing a judge to resolve contested questions as to whether a particular prior conviction

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See Brief of Families Against Mandatory Minimums as *Amicus Curiae* in Support of Petitioner.

was, in fact, a violent felony does more than merely raise constitutional questions—the exercise of such power violates a defendant's rights to notice, trial by jury, and proof beyond a reasonable doubt. *Shepard* v. *United States*, 544 U.S. 13, 28 (2005) (Thomas, J., concurring); see also *James* v. *United States*, 127 S. Ct. 1586, 1610 (2007) (Thomas, J., dissenting).

Third, the "all crimes" interpretation violates the separation-of-powers doctrine. It requires courts to perform the essentially legislative function of defining the circumstances that set the range of permissible penalties, rather than performing the proper judicial function of interpreting and applying law enacted by Congress. The "all crimes" interpretation requires courts to go beyond traditional boundaries of statutory construction and declare whole categories of crimes within the ambit of the statute. Through the guise of statutory interpretation, the "all crimes" approach arrogates to the courts the legislative function of establishing minimum and maximum penalties for subsequent violations, and retroactively for prior violations, of the felon-in-possession statute. Even assuming that the Constitution permitted Congress to delegate to the courts the power to define which crimes invoke the ACCA's penalties, doing so under the excessively broad "all crimes" interpretation would be a delegation bereft of any intelligible principle to guide the courts' discretion.

The Court can avoid the "grave and doubtful" constitutional problems, *Jones* v. *United States*, 526 U.S. 227, 239 (1999), raised by the "all crimes" interpretation by adopting either Petitioner's "similar crimes" approach or an elements-based approach that would require predicate crimes to have as an element conduct that creates a "serious potential risk of

physical injury to another." Petitioner's "similar crimes" approach provides a coherent and predictable way for courts to implement the statute, and so does not implicate the void-for-vagueness doctrine. By requiring judges to determine whether the prior offense is similar to the ACCA's enumerated offenses, this approach conforms to traditional statutory construction. It also avoids the Fifth and Sixth Amendment concerns raised by the "all crimes" interpretation, because judges need not find facts to determine whether the offenses are similar in the relevant respects. Because the "similar crimes" approach constitutes nothing more than traditional statutory interpretation, it does not require courts to engage in sweeping legislative determinations regarding which crimes present the requisite degree of risk of injury.

Alternatively, an elements-based interpretation accords with the Court's "categorical" approach in *Taylor* and *Shepard*. It turns only on whether the prior conviction had as an explicit element conduct that presented a "serious potential risk of physical injury to another," putting defendants clearly on notice as to what conduct is covered by the "otherwise" clause. It also resolves potential Fifth and Sixth Amendment concerns because judges rely only on the fact of a prior conviction and the elements charged and proved beyond a reasonable doubt to a jury or admitted in a plea. By removing judicial discretion, this interpretation eliminates all doubt that judges are legislating. Instead, judges' decisions are governed by the legislatively enacted elements of statutes. Finally, this interpretation would not render superfluous the "use of force" provision in § 924(e) because the "otherwise" clause would apply

to a number of reckless endangerment crimes to which the "use of force" provision would not apply.

ARGUMENT

I. THE "ALL CRIMES" INTERPRETATION RAISES GRAVE AND DOUBTFUL CONSTITUTIONAL QUESTIONS.

A. Standardless.

The "all crimes" interpretation of the ACCA's "otherwise" clause is standardless because it divorces that clause from the preceding enumerated offenses and fails to engage in standard statutory interpretation to cabin the clause's broad reach. Because it lacks standards, this interpretation allows, if not requires, judges to apply their own conjectures and prejudices regarding degrees of risk posed by entire categories of offenses in making law under the ACCA.

The Tenth Circuit makes no attempt to assess the quantum of risk necessary to pose a "serious potential risk of physical injury" under the ACCA. Similarly, no means is provided to determine whether a crime poses such a risk. Neither does the opinion offer a means of comparing the relative risks of unenumerated crimes to the crimes that are enumerated in the statute. For these reasons, the majority opinion offers no guidance whatsoever for courts to categorize coherently some risks of physical injury as "serious potential" ones, while excluding other risks of physical injury. This reading potentially sweeps in all crimes that pose any risk that might be imagined, depending upon the unguided, subjective speculation of the court.

That the "all crimes" interpretation is completely standardless and thus forces courts to engage in

unguided policymaking is made abundantly clear by the breathtaking range of unenumerated offenses that the lower courts have "interpreted" to be "violent felonies" subject to the ACCA's dramatically enhanced penalty range. This broad range includes: (1) failure to report to county jail, *United States v. Golden*, 466 F.3d 612 (7th Cir. 2007), *petition for cert. filed*, No. 06-10751 (U.S. Apr. 9, 2007), (2) failure to stop in response to a police car's blue flashing light, *United States* v. *James*, 337 F.3d 387 (4th Cir. 2003), (3) possession of a sap, an item similar to a blackjack, *United States* v. *Canon*, 993 F.2d 1439 (9th Cir. 1993), (4) unarmed theft of a bicycle, *United States* v. *Howze*, 343 F.3d 919 (7th Cir. 2003), (5) operating a jeep without the owner's consent, *United States* v. *Jones*, 224 F. App'x 548 (8th Cir. 2007), *petition for cert. filed*, No. 07-6252 (U.S. Aug. 28, 2007), and (6) pick-pocketing, *United States* v. *Mobley*, 40 F.3d 688 (4th Cir. 1994). All of these crimes are far afield of what this Court in *Taylor* v. *United States* recognized as the purpose of the ACCA's statutory sentencing enhancement: the need to punish most severely that category of violent, recidivist offenders who were disproportionately responsible for violent crimes in the nation. See 495 U.S. 575, 584-87 (1990).

The ultimately *ad hoc* nature of the standardless "all crimes" interpretation is further evidenced by the divisions among the courts of appeals on whether certain crimes fall within the "otherwise" clause. For example, courts are split on whether failure-to-report escapes fall within the "otherwise" clause.[4] Courts

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[4] *Compare, e.g.*, *United States* v. *Chambers*, 473 F.3d 724, 726 (7th Cir. 2007), *petition for cert. filed*, No. 06-11206 (U.S. May 8, 2007); *United States* v. *Mathias*, No. 06-4109, 2007 WL 1097952, at *3-5 (4th Cir. Apr. 13, 2007), *petition for cert. filed*, No. 07-61 (U.S. July 12, 2007); *United States* v. *Ruiz*, 180 F.3d 675, 676-77

are similarly divided on whether the state crime of retaliation for a public official's past action falls within the "otherwise" clause. Compare *United States* v. *Sawyers*, 409 F.3d 732 (6th Cir.), *cert. denied*, 546 U.S. 950 (2005), with *United States* v. *Montgomery*, 402 F.3d 482 (5th Cir. 2005).

It is hardly surprising that an essentially standardless test has produced divergent views among the lower courts. And a decision by this Court applying such a standardless test to *this* particular offense (felony DWI) would do little to guide lower courts to consistent results with respect to *other* unenumerated felonies. *Amicus* submits that this Court should not only resolve this case, but in the process articulate a standard that respects Congress's intent and provides guidance sufficient to lower courts to produce consistent results. See *infra*, at 25-30 (providing two alternative interpretations).

Not only is the "all crimes" approach undesirable because of its unpredictable application across different unenumerated crimes, it is also constitutionally suspect for a variety of reasons. This infinitely malleable standard that provides no guidance and thus forces judges to make fact findings based on speculation and their own policy judgments—fact findings that in turn increase the

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(5th Cir. 1999); *United States* v. *Anglin*, 169 F. App'x 971, 975 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 1249 (2007); *United States* v. *Rivera*, 127 F. App'x 543, 545 (2d Cir. 2005); *United States* v. *Winn*, 364 F.3d 7, 12 (1st Cir. 2004); *United States* v. *Luster*, 305 F.3d 199, 202 (3d Cir. 2002); *United States* v. *Turner*, 285 F.3d 909, 915-16 (10th Cir. 2002); *United States* v. *Gay*, 251 F.3d 950, 952-55 (11th Cir. 2001) (per curiam), *and United States* v. *Nation*, 243 F.3d 467, 472 (8th Cir. 2001), *with United States* v. *Piccolo*, 441 F.3d 1084, 1088-90 (9th Cir. 2006), *and United States* v. *Thomas*, 333 F.3d 280, 282-83 (D.C. Cir. 2003).

prescribed penalty range for violators of 18 U.S.C. § 922(g) from a range of zero to ten years, to a range of fifteen years to life—implicates at least three "grave and doubtful" constitutional questions, *Jones*, 526 U.S. at 239: the void-for-vagueness doctrine, the Fifth and Sixth Amendments, and the separation-of-powers doctrine. We discuss each in turn below.

B. Void For Vagueness.

The "all crimes" interpretation fails to put ordinary persons on notice that felony DWI is a violent felony under the ACCA. Justice Scalia identified this potential defect in the statute last term in *James*. See 127 S. Ct. at 1601-02 (Scalia, J., dissenting). The *James* Court decided that attempted burglary was a violent felony under the ACCA because it posed a risk of physical injury similar to the risk posed by burglary—an offense Congress enumerated in the ACCA. See *id.* at 1597. Justice Scalia recognized that, when faced with an offense that had no analog among the enumerated offenses, as in this case, serious constitutional issues would arise under the void-for-vagueness doctrine. See *id.* at 1601-02 (Scalia, J., dissenting).

In Justice Scalia's view, the absence of a standard for determining whether the ACCA applies to an offense that is neither included as an enumerated offense, nor has an analog among them, would leave a substantial gap in the interpretation of the ACCA, both ill serving courts and counsel, and depriving potential offenders of notice as to what conduct would subject them to the ACCA. See *id.* ("Imprecision and indeterminacy are particularly inappropriate in the application of a criminal statute. Years of prison hinge on the scope of the ACCA's residual provision, yet its boundaries are ill defined."). The majority

agreed that guidance was a "worthy objective,"[5] but did not reach the question because the Court was only presented with an offense that had a clear analog among the enumerated offenses. *Id.* at 1598.

Unlike this Court in *James*, the Tenth Circuit was presented with an unenumerated offense that did not have a clear analog among the enumerated offenses. By failing to provide a concrete standard that would provide notice to potential offenders, the Tenth Circuit's interpretation implicates constitutional vagueness concerns. See *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."); *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974) ("Due process requires that all be informed as to what the State commands or forbids, and that men of common intelligence not be forced to guess at the meaning of the criminal law.") (internal quotation marks and citations omitted).

The Tenth Circuit's holding that felony DWI is a "violent felony" pursuant to its "all crimes" interpretation was particularly unforeseeable because New Mexico law explicitly disclaims

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[5] In *James*, this Court in *dicta* touched briefly on the notice problem presented by the "otherwise" clause, noting that the clause did not prevent an ordinary person from understanding what conduct it prohibits because "[s]imilar formulations have been used in other federal and state criminal statutes." 127 S. Ct. at 1598 n.6. However, in each statute the Court cited, the similar language constitutes an *element* of the crime, and therefore places defendants on notice. Nor was a void for vagueness challenge even presented to the *James* Court. *Id.*

inclusion of felony DWI in the State's habitual offender sentencing statute. In *State* v. *Begay*,[6] the New Mexico Supreme Court expressly held that felony DWI is not a "prior felony . . . conviction" for purposes of the State's habitual offender sentencing enhancement statute, N.M.S.A. § 31-18-17 (1978). 17 P.3d 434, 435-36 (N.M. 2001). The New Mexico Supreme Court reasoned that because the State's habitual offender statute did not expressly include felony DWI and the legislative history was silent, the rule of lenity required interpretation in favor of the defendant. *Id.* Two years later, in 2003, the New Mexico legislature codified the New Mexico high court's decision to exclude felony DWI convictions from the legislature's definition of "prior felony conviction" for purposes of the State's habitual offender sentencing enhancement statute. See N.M.S.A. § 31-18-17 (1978) (as amended by Pub. L. 2003, Ch. 90, § 1).

Moreover, the present state of federal law also precludes any claim of reasonable notice to offenders with prior convictions for DWI. In *Leocal* v. *Ashcroft*, this Court recognized that "[t]he ordinary meaning of" the term "crime of violence" in 18 U.S.C. § 16 "suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses." 543 U.S. 1, 11 (2004). This Court explained that "[i]nterpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes" and thus the term "crime of violence" "cannot be read to include petitioner's conviction for DUI causing serious bodily injury." *Id.*

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[6] Petitioner was not the defendant in that case.

If this Court adopts the "all crimes" interpretation, it will only sow further confusion going forward as to what constitutes a "crime of violence" or "violent felony" in multiple federal statutes. Whatever fine distinctions there might be between differing interpretations of "crime of violence" under 18 U.S.C. § 16 and of "violent felony" under the ACCA's "otherwise" clause with respect to DUI and DWI offenses, ordinary persons cannot be expected to draw them. Accordingly, offenders with prior convictions for felony DWI could not have been on notice that their prior convictions were ACCA predicates, because both federal and state law strongly indicated to the contrary. See *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.").

The "all crimes" interpretation also invokes the second principal element of the vagueness doctrine—arbitrary enforcement. As discussed *supra*, at 6-7, the "all crimes" interpretation requires judges to speculate about the degree of risk posed by entire categories of offenses in making law under the ACCA, a process that calls upon judges to rely upon their own predilections in evaluating such risk. "Statutory language of . . . standardless sweep allows [judges] to pursue their personal predilections" and that "is precisely what offends the Due Process Clause." *Smith*, 415 U.S. at 574-75, 578. In the absence of any conceivable notice to offenders that their felony DWI convictions might count as ACCA predicates, and because the Tenth Circuit's interpretation of the statute throws open the door to arbitrary assessment, the Tenth Circuit's interpretation is void for vagueness.

C. The Fifth And Sixth Amendments.

The "all crimes" interpretation of the "otherwise" clause necessarily requires a court to conduct some form of factual investigation of the degree of risk of physical injury presented by the type of offense at issue. And because such a finding increases the permissible penalty from a range of zero to ten years to a range of fifteen years to life in prison, see 18 U.S.C. §§ 924(a)(2), (e)(1), the full panoply of Fifth and Sixth Amendment rights must apply. See *Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *Jones*, 526 U.S. at 243 n.6 (recognizing the principle that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt").[7]

Apprendi and its progeny also recognize that the mere fact of a prior conviction, although it may increase the penalty for a crime "beyond the prescribed statutory maximum," need not be charged in an indictment, "submitted to a jury, [or] proved beyond a reasonable doubt." 530 U.S. at 490. This is

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[7] Even when courts find facts to determine a sentence within a range set by Congress, the basic due process requirements of notice, a meaningful opportunity to be heard, reliable information, and a burden of proof borne by the government apply. See *Rita* v. *United States*, 127 S. Ct. 2456, 2465 (2007); *Burns* v. *United States*, 501 U.S. 129, 137-38 (1991); *United States* v. *Tucker*, 404 U.S. 443, 447 (1972); *Townsend* v. *Burke*, 334 U.S. 736, 740-41 (1948).

because the certainty that the defendant received those constitutional protections in the proceeding resulting in the conviction ameliorates the concern that taking judicial notice of the fact of conviction, by itself, violates the defendant's constitutional rights in the later proceeding. *Id.* at 487-88; see also *Jones*, 526 U.S. at 249 ("[A] prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.").

Here, however, the court of appeals went beyond taking mere judicial notice of the fact of prior felony DWI convictions and *independently* found that the conduct involved in those offenses "presents a serious potential risk of physical injury to another," a fact that is *neither* in the statutory definition of the elements of the offense, *nor* in the case law interpreting felony DWI in New Mexico.[8] In other words, Petitioner has not admitted in a guilty plea, nor has a jury found beyond a reasonable doubt, that Petitioner's felony DWI offenses involved conduct presenting "a serious potential risk of physical injury to another."

Nonetheless, the court of appeals determined, without considering any evidence (because the prosecution presented none to the district court), that "DWI certainly presents such a risk. Many would say that the gravest risk to their physical safety from criminal misconduct is from drunken drivers." JA 92.

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[8] Indeed, New Mexico's drunk driving statute recognizes a *separate* crime of "aggravated driving while under the influence" for which, *inter alia*, actually causing physical harm *is* an element. N.M.S.A. § 66-8-102 (1978) (as amended by Pub. L. 2007, Chs. 321-22). However, even this crime is not a felony until the fourth instance. *Id.*

As such, the court conducted judicial fact-finding that went far beyond the fact of conviction and the elements of New Mexico DWI as adjudicated against Petitioner in his prior convictions. As Justice Thomas has observed, allowing a judge to resolve contested questions as to whether a particular prior conviction was, in fact, a "violent felony" does more than merely raise constitutional questions—the exercise of such power violates a defendant's rights to notice, trial by jury, and proof beyond a reasonable doubt. *Shepard*, 544 U.S. at 28 (Thomas, J., concurring); see also *James*, 127 S. Ct. at 1610 (Thomas, J., dissenting).[9]

It is no answer to say that the Tenth Circuit did not conduct judicial fact-finding because it relied upon *no evidence* and was merely "engaging in statutory interpretation." *James*, 127 S. Ct. at 1600.[10] "The

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[9] Moreover, as noted in Justice Thomas's separate concurrence in *Apprendi*, even fact-finding limited to the mere fact of the prior conviction may raise the same grave constitutional questions as fact-finding in relation to other enhancements. 530 U.S. at 519-21 (Thomas, J., concurring).

[10] In this case, as is commonly the case, the district court received no evidence regarding the risk of physical injury to another as a result of DWI, but instead relied upon opinions from various courts of appeals holding that the distinctly different definition of "crime of violence" in the career offender guideline, U.S.S.G. § 4B1.2, included DWI. However, the Sentencing Commission has made clear that "the definition[ ] of 'violent felony' . . . in 18 U.S.C. § 924(e)(2) [is] not identical to the definition[ ] of 'crime of violence' . . . used in § 4B1.1 (Career Offender)." U.S.S.G. § 4B1.4, comment (n.1). Indeed, the Commission's definition of "crime of violence" in the career offender guideline is similar to the "all crimes" interpretation because it, too, delinks the "otherwise" clause from the enumerated offenses that precede it. *See* U.S.S.G. § 4B1.2, comment (n.1).

court's characterization of its findings . . . as derived from 'common experience' does not make them any less 'facts.'" *United States* v. *Washington*, 404 F.3d 834, 842 n.9 (4th Cir. 2005). Judicial *speculation* about *factual* risk regarding a particular crime, or an entire category of crimes, is particularly pernicious, as it only exacerbates the constitutional difficulties posed by the Tenth Circuit's interpretation. See *United States* v. *Chambers*, 473 F.3d 724, 726 (7th Cir. 2007) ("[I]t is an embarrassment to the law when judges base decisions of consequences on conjectures, in this case a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses.").

Traditionally, risk is a factual question for the jury.[11] That is not surprising, as it is the province of

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[11] *See, e.g.*, *Byrd* v. *Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 539 n.13 (1958) ("The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.") (internal citation omitted); *Dunbar* v. *Jackson Hole Mountain Resort Corp.*, 392 F.3d 1145, 1149 (10th Cir. 2004) (stating that "whether something is or is not an inherent risk is a factual question that must be sent to the jury for determination") (internal citation omitted); *Flores* v. *City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004) (whether particular use of force is "deadly force," *i.e.*, "carrying with it a substantial risk of causing death or serious bodily harm," "is a question of fact, not one of law") (internal citation omitted); *Sapone* v. *Grand Targhee, Inc.*, 308 F.3d 1096, 1102 (10th Cir. 2002) ("Where genuine issues of material fact exist, the determination of whether something is or is not an inherent risk is a factual question that must be sent to the jury for determination."); *Dilluorth* v. *Gambardella*, 970 F.2d 1113, 1119 (2d Cir. 1992) (recognizing that "what risks in a sport are inherent, obvious, or necessary to its participation [are] question[s] that ordinarily must be resolved by the jury"); *O'Dell* v. *Hercules, Inc.*, 904 F.2d

the jury to decide issues of fact, as well as mixed issues of law and fact. See *United States* v. *Gaudin*, 515 U.S. 506, 513-15 (1995). Indeed, the reckless endangerment crimes cited in *James*, 127 S. Ct. at 1599 n.6, are precisely the types of risk assessments that juries perform, treating the dangerous conduct as a legislated element of the crime that must be proved beyond a reasonable doubt by evidence.

In *James*, the Court asserted that there was no Sixth Amendment violation because "the Court [was] engaging in statutory interpretation, not judicial fact finding." *Id.* at 1600. But the *James* opinion is *sui generis* because it involved the Florida offense of attempted burglary, a crime for which there was an appropriate analog in the enumerated offenses. Because Florida attempted burglary requires an overt act toward entry into a premises, it was so analogous to burglary that this Court was arguably able to "apply[ ] *Taylor*'s categorical approach," *id.*, and not run afoul of the defendant's constitutional rights.

1194, 1201 (8th Cir. 1990) ("risk of harm associated with exposure to dioxin," compared to risk associated with "use of controlled substances, was question of fact integral to a determination of risk of harm"); *Waffen* v. *U.S. Dep't of Health & Human Services*, 799 F.2d 911, 922 (4th Cir. 1986) (in medical malpractice case, whether increased risk of harm posed by defendant's conduct amounted to loss of substantial possibility of survival is question for the fact finder), *abrogated on other grounds by Hurley* v. *United States*, 923 F.2d 1091 (4th Cir. 1991); *Lust* v. *Clark Equip. Co.*, 792 F.2d 436, 440 (4th Cir. 1986) ("Whether [the defendant] fully appreciated the nature and extent of the risk presented a factual question for the jury—not the court"); *Mason* v. *Hunter*, 534 F.2d 822, 824 (8th Cir. 1976) ("The question of the assumption of risk is generally one of fact for the jury.").

In *Taylor*, this Court held that the only plausible interpretation of § 924(e)(2)(B) is that it requires the sentencing court "to look only to the fact of conviction and the *statutory definition* of the prior offense." 495 U.S. at 602 (emphasis added); see also *Shepard*, 544 U.S. at 17. Thus, courts may do no more than compare the statutory elements of the offense of conviction or the adjudicated elements of the offense of conviction to the elements of the sentence-enhancing clause and then conclude whether they "substantially correspond." *Taylor*, 495 U.S. at 602. The *Taylor* Court required courts to *compare elements* because (anticipating *Apprendi*) it recognized the constitutional implications for a defendant's right to a jury trial if § 924(e)(2)(B) were to be interpreted to permit a "factual approach." *Id.* at 601.

Courts cannot successfully employ the *Taylor* elements test to the panoply of unenumerated crimes that do not have an analog to one of the enumerated crimes in § 924(e)(2)(B), and which do not contain as an explicit element conduct that "presents a serious potential risk of physical injury to another."[12] That is because for those crimes courts must look *beyond* the crime's statutory definition (or adjudicated/plea elements) to consider the generic nature, possible consequences, and likely circumstances of the crime in determining whether it presents a serious potential risk of injury to others. By improperly employing the *Taylor* elements test and engaging in judicial fact-finding beyond merely taking judicial notice of prior convictions, the "all crimes"

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[12] Indeed, this Court in *James* cited several statutes that rely on language similar to that in the "otherwise" clause. 127 S. Ct. at 1598 n.6. Importantly, in *each* statute cited, the language constitutes an *element* of the crime and is therefore protected by all of the guarantees of the Fifth and Sixth Amendments.

interpretation implicates grave Fifth and Sixth Amendment concerns.

This Court acknowledged in *James* that it was not providing guidance about how to determine whether a crime that is not analogous to an enumerated crime in the ACCA is a violent felony. See *James*, 127 S. Ct. at 1598 ("provid[ing] guidance for the lower courts in future cases [is] surely a worthy objective," but *James* itself is not a proper case to do so because the case does not present such a crime). Such guidance, however, is found in *Taylor* and *Shepard*, as well as in *Haley*, where the Court explicitly recognized that the parameters of the "prior conviction" exception raise "difficult constitutional questions . . . to be avoided if possible." *Dretke* v. *Haley*, 541 U.S. 386, 395-96 (2004).[13] This Court should employ the doctrine of constitutional avoidance and adopt one of the interpretations discussed *infra*, at 25-30, which do not create such questions.

D. Separation of Powers.

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. Art. I, sec. 1. Defining crimes and assigning the range of permissible penalties is a legislative power vested exclusively in Congress; it may not be delegated to or

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[13] Following this Court's direction in these cases, several lower courts have recognized that the prior conviction exception must be narrowly construed. *See, e.g.*, *Washington*, 404 F.3d at 834 (holding that, in light of *Shepard*, the "prior conviction exception" is a limited one that does not permit judicial fact-finding regarding facts not contained in the indictment or the other documents *Shepard* permits); *United States* v. *Kortgaard*, No. 03-10421, 2005 WL 2292046 (9th Cir. Sept. 21, 2005) (recognizing that facts beyond the mere fact of conviction must be made by a jury or considered on an advisory basis).

assumed by the Judicial Branch. See *United States* v. *Evans*, 333 U.S. 483, 486 (1948) (observing that "as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions"); *Ex parte United States*, 242 U.S. 27, 41-42 (1916) (stating that "the authority to define and fix the punishment for crime is legislative," while the "right . . . to impose the punishment provided by law, is judicial"); *United States* v. *Wiltberger*, 18 U.S. (1 Wheat) 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment."); *United States* v. *Hudson*, 11 U.S. (1 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.").

Under the ACCA, Congress has delegated to the courts the task of determining whether an offense that does not have force as an element; is not burglary, arson, or extortion; and does not involve the use of explosives, is nonetheless a "violent felony" because it "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). This determination increases the statutory penalty from a range of zero to ten years to a range of fifteen years to life in prison. See 18 U.S.C. §§ 924(a)(2), (e)(1). Because the "all crimes" interpretation of the "otherwise" clause provides no standards for this important determination, it assumes that Congress intended to delegate to the courts the legislative responsibility to define aggravated crimes with a distinct minimum and maximum penalty. It requires the courts to make "an essentially legislative judgment." *United States* v. *Thomas*, 159 F.3d 296, 300 (7th Cir. 1998). The courts must determine the "potential risk" of

physical injury presented by a category of offense—a factual question which in practice is answered by hypotheticals and speculation—and then make an assessment of whether that degree of risk is "serious" enough as a policy matter to warrant increasing the statutory minimum from zero to fifteen years and the statutory maximum from ten years to life.

This approach gives the courts unlimited "power to subject almost any repeat offender to ACCA's 15-year mandatory minimum." *James*, 127 S. Ct. at 1606 n.4 (Scalia, J., dissenting); see also *Golden*, 466 F.3d at 617 (Williams, J., dissenting) (observing that "if Congress intended for the courts to examine the risk of physical injury in the abstract, it could have simply instructed the courts that 'violent felonies' are all those involving 'conduct that presents a serious potential risk of injury to another'"). This "goes beyond dispelling ambiguity in the usual sense of judicially construing statutes and . . . require[s individual judges, the courts of appeals, and] this Court to invade the legislative function and in effect, fix the penalty." *Evans*, 333 U.S. at 486, 488-91 (declining to read into a criminal statute a penalty that clearly applied to only one form of the offense as applying to other conduct that may or may not have been prohibited by the statute).

When a court decides that a category of offense "presents a serious potential risk of injury to another," not through statutory construction, but as a matter of fact, policy, conjecture, or personal predilection, it raises the permissible sentencing range of zero to ten years, to fifteen years to life. Well beyond "impos[ing] sentences within the broad limits established by Congress," the effect is to "bind and regulate the primary conduct of the public [and to] vest in the Judicial Branch the legislative

responsibility for establishing minimum and maximum penalties." *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989).[14]

The power to define what conduct sets the minimum and maximum permissible range, not through statutory construction but through fact-finding, policymaking, conjecture, or personal predilection, is in no way "ancillary to" the proper judicial function of sentencing within a range established by Congress. While "[t]rial judges could be given the power to determine what factors justify a greater or lesser sentence *within the statutorily prescribed limits* because that was ancillary to their exercise of the judicial power [to] pronounc[e] sentence upon individual defendants," *id.* at 417-18 (Scalia, J., dissenting) (emphasis added), judges have no power, implied or inherent, to disregard a sentence fixed by Congress, *Ex parte United States*, 242 U.S. at 41-42, or to sentence below or above the range set by Congress. Because the "all crimes" interpretation requires judges to exercise legislative

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[14] In holding that the Sentencing Commission's activities did not violate the separation of powers, the Court repeatedly noted that the Commission's authority to make substantive and political judgments in promulgating guidelines does not have the effect of altering the minimum or maximum permissible punishment. See *Mistretta*, 488 U.S. at 375 (guideline "sentencing ranges must be consistent with pertinent provisions of Title 18 . . . and could not include sentences in excess of the statutory maxima"); *id.* at 378 n.11 (The "Commission could include the death penalty within the guidelines only if that punishment was authorized . . . by Congress and only if such inclusion comported with the substantial guidance Congress gave the Commission in fulfilling its assignments."); *id.* at 391 (analogizing Commission's role to "the consistent responsibility of federal judges to pronounce sentence within the statutory range established by Congress").

power that is not ancillary to any valid judicial power, it reflects a "pure delegation of legislative power" that is wholly invalid under the separation-of-powers doctrine. *Mistretta*, 488 U.S. at 420 (Scalia, J., dissenting).

Moreover, when courts must perform the legislative function of determining which categories of prior offenses constitute "violent felonies" subject to a distinct minimum and maximum penalty simultaneously with exercising the judicial function of imposing sentence, the "all crimes" interpretation unites legislative and judicial powers in the court in a way that violates the separation of powers. By contrast, the Sentencing Commission's "political or quasi-legislative . . . powers are not united with the powers of the Judiciary in a way that has meaning for separation-of-powers analysis" because the Commission "is not a court and exercises no judicial power." *Id.* at 393, 408; see also *United States* v. *Booker*, 543 U.S. 220, 242-43 (2005). But when judges apply the "all crimes" interpretation of the "otherwise" clause, they are indisputably "wear[ing] both hats at the same time," which the Constitution forbids as a *per se* matter. *Mistretta*, 488 U.S. at 404.

Finally, even assuming that Congress could delegate to the courts the power to define which crimes invoke the ACCA's minimum and maximum permissible sentencing range, doing so under the "all crimes" interpretation would be an "excessive delegation" due to the absence of an "intelligible principle to which [the court] is directed to conform." *Id.* at 372. In sharp contrast to Congress's detailed directives to the Sentencing Commission, *id.* at 374-78, the "all crimes" interpretation looks only to the bare phrase, "otherwise involves conduct that

presents a serious potential risk of physical injury to another," without reference to any other part of the statutory provision or its legislative history.

That this is not an intelligible standard is patent in the court of appeals' finding in this case: "Many would say that the gravest risk to their physical safety from criminal misconduct is from drunken drivers." JA 92. Other courts have openly acknowledged that "such a nebulous standard cries out for speculation regarding facts extraneous to the prior conviction." *United States* v. *Thompson*, 421 F.3d 278, 286 (4th Cir. 2005); see also *Chambers*, 473 F.3d at 726-27 (noting that "it is an embarrassment to the law when judges base decisions of consequence on conjectures . . . floating well free of any facts," and suggesting that "Congress, which has investigative tools, might examine the issue"); *Golden*, 466 F.3d at 615 (Rovner, J., concurring) ("we do not know the actual risks to law enforcement officers in recaptures following escapes . . . versus captures following failure to report to jail," and we "have no way of knowing"). Because courts lack the constitutional authority to make the quintessential legislative judgment of which crimes are risky enough to warrant ACCA enhancement, the Tenth Circuit's interpretation runs afoul of separation of powers.

This Court has been vigilant against the danger "that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches,'" *Mistretta*, 488 U.S. at 383 (quoting *Morrison* v. *Olsen*, 487 U.S. 654, 680-81 (1988)), and has invalidated attempts by Congress to reassign powers vested by the Constitution in one Branch to another, *id.* at 382. To guard against that danger in this case, the "all crimes" interpretation of the ACCA's "otherwise" clause must be rejected.

II. THE "OTHERWISE" CLAUSE SHOULD BE INTERPRETED IN A WAY THAT CREATES A STANDARD FOR JUDGES AND AVOIDS SERIOUS CONSTITUTIONAL QUESTIONS.

The constitutional questions raised by the Tenth Circuit's standardless interpretation of the "otherwise" clause in § 924(e) are significant but avoidable. These "grave and doubtful" questions, *Jones*, 526 U.S. at 239, discussed *supra*, can be avoided by adopting either: (1) Petitioner's interpretation, which would limit the applicability of the "otherwise" clause to crimes similar to those listed in the statute in ways made relevant in light of principles of statutory construction, or (2) an interpretation under which the "otherwise" clause would require that predicate offenses have as an explicit element conduct presenting a "serious potential risk of physical injury to another."

Each of these interpretations would avoid the unconstitutional vagueness of the "all crimes" approach by providing a principled way to clearly delineate crimes punishable under the ACCA. Additionally, either approach would resolve the constitutional concerns regarding the Fifth and Sixth Amendments as well as separation of powers by allowing judges to return to their role as interpreters of statutes instead of requiring them both to find facts beyond the mere fact of conviction and to legislate.

A. "Similar Crimes" Interpretation.

Petitioner's suggested "similar crimes" interpretation of the "otherwise" clause avoids the constitutional issues raised by the "all crimes" interpretation. Pet. Br. at 44-45. The "similar crimes" interpretation—requiring that a crime be

similar to those listed in that they are violent, active crimes against property that are typically committed by career offenders as a means of livelihood and that are made more dangerous when committed with a firearm—is not unconstitutionally vague, and it prevents the courts from violating the Fifth and Sixth Amendments by finding facts or from violating separation of powers by legislating.

This Court noted in *James* that "[t]he specific offenses enumerated in [§ 924(e)(2)(B)] (ii) provide one baseline from which to measure whether other similar conduct 'otherwise . . . presents a serious potential risk of physical injury.'" 127 S. Ct. at 1594. Judges using the enumerated offenses as a baseline can reasonably be expected to determine whether similar crimes are predicate offenses under the ACCA, and defendants with prior convictions for "similar crimes" reasonably can be said to be on notice that their prior convictions are predicates. See, *e.g.*, *id.* ("[W]e can ask whether the risk posed by attempted burglary is comparable to that posed by its closest analog among the enumerated offenses—here, completed burglary."). Interpreting the "otherwise" clause to require that predicate crimes be similar to those enumerated in the statute in relevant respects would provide the clarity the Constitution requires of penal statutes.

Petitioner's "similar crimes" interpretation likewise avoids the "grave and doubtful" Fifth and Sixth Amendment issues, *Jones*, 526 U.S. at 239, raised by the "all crimes" interpretation. The "similar crimes" interpretation would require courts to engage only in traditional statutory interpretation by determining whether or not the prior offense is similar to the enumerated offenses in ways made relevant by well-established tools of statutory construction—and not

speculative fact-finding based upon perceived levels of risk. This is precisely what *Taylor*'s categorical approach requires courts to do. 495 U.S. at 602. See *supra*, at 18-19.

The "similar crimes" interpretation also does not raise constitutional concerns over the separation-of-powers doctrine. Under this approach, courts need only interpret the "otherwise" clause in light of principles of statutory construction to clarify which crimes are similar to those listed—an exercise akin to the Court's test in *Taylor*. 495 U.S. at 602.

Finally, the ACCA's legislative history supports the "similar crimes" interpretation, further suggesting this interpretation is constitutionally unproblematic. See Pet. Br. at 25-28; *Taylor*, 495 U.S. at 584-87 (§ 924(e)(2)(B)(ii) was enacted to "add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and *similar* crimes as predicate offenses") (quoting H.R. Rep. No. 99-849, at 3 (1986)) (emphasis added). It is apparent Congress did not believe it was constitutionally problematic to ask the courts to determine which crimes should be considered "similar" to those listed.

B. An Elements-Based Approach.

An elements-based interpretation of the "otherwise" clause is consonant with the Court's "categorical" approach in *Taylor* and *Shepard*. This interpretation would require that predicate crimes included under the "otherwise" clause have as an explicit element conduct that "presents a serious potential risk of physical injury to another." Like the interpretation proposed by Petitioner, this interpretation is not impermissibly vague and does not require judges to increase the minimum and maximum sentences based on facts that were never charged, proved to a

jury, or found beyond a reasonable doubt, or to legislate in violation of separation of powers. Nor does this interpretation render superfluous § 924(e)'s "use of physical force" element provision, because the "otherwise" clause would apply to a number of crimes involving reckless behavior that would not be punishable under the ACCA's force-as-an-element clause.

The first strength of an elements-based reading of the "otherwise" clause is its clarity. It would be abundantly clear to individuals whether they are eligible for punishment under the ACCA. If a prior conviction has as an element a "serious potential risk of physical injury to another," individuals can be sure it is a predicate crime under the "otherwise" clause; without this element, they can be equally sure it is not.

Additionally, an elements-based reading would address concerns regarding the Fifth and Sixth Amendments because judges would determine the applicability of the "otherwise" clause based only on *elements* of a prior conviction, instead of engaging in any impermissible judicial fact-finding. *Taylor*, 495 U.S. at 600-02; *Shepard*, 544 U.S. at 24-26 (plurality opinion). See *supra*, at 18-19.

Adopting the elements-based interpretation would simply mean this Court's reaffirming *Taylor*'s categorical approach by maintaining the requirement that the elements of the prior conviction "substantially correspond" to the elements of the sentence-enhancing clause, specifically, conduct that presents a "serious potential risk of physical injury to another." Because this interpretation asks courts only to look to the elements of prior convictions, which are established by the legislature and previously charged and tried before a jury or

admitted by the defendant, no Fifth or Sixth Amendment issues are implicated. See *Apprendi*, 530 U.S. at 490.

Finally, this interpretation definitively resolves any concerns that judges are legislating, because they would have no discretion as to which crimes are predicate offenses under the "otherwise" clause. Cf. *Evans*, 333 U.S. at 486. Instead, the legislatively established elements of a prior conviction would drive the determination as to whether the "otherwise" clause applies.

This interpretation would not render superfluous the "use of force" provision of the ACCA, because the "otherwise" clause would apply to a significant number of reckless endangerment crimes. The ACCA includes as a category of predicate crimes those that have as an element "the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). In *Leocal* this Court determined that, in an identical clause, the word "use" limited its application, because it "suggests a higher degree of intent than negligent or merely accidental conduct." 543 U.S. at 9.

An elements-based reading of the "otherwise" clause would apply it to crimes in which the offender could not be said to have "used" force against another person, but nonetheless created a serious potential risk of physical injury to another. These are, in large part, reckless endangerment crimes under both federal and state law. *E.g.*, 18 U.S.C. § 2332b(a)(1)(B) (defining "terrorist act" as conduct that, *inter alia*, creates "a substantial risk of serious bodily injury to any other person"); Ala. Code § 13A-6-24(a) (reckless endangerment requires finding of "conduct which creates a substantial risk of serious physical injury to another person."); Alaska Stat.

§ 11.41.250(a) (same); N.Y. Penal Law § 120.20 (same).[15] Additionally, this element is found in a significant number of crimes, several of which the Court cited in *James*. 127 S. Ct. at 1598 n.6. The elements-based interpretation would thus give effect to all of the provisions of § 924(e).

Thus, this Court can, and should, avoid the constitutional questions raised by the Tenth Circuit's interpretation of the "otherwise" clause in § 924(e) by adopting either: (1) Petitioner's interpretation, which would limit the applicability of the "otherwise" clause to crimes similar to those listed in the statute in ways made relevant in light of principles of statutory construction, or (2) an interpretation under which the "otherwise" clause would require that predicate offenses have as an explicit element conduct presenting a "serious potential risk of physical injury to another."

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court of appeals.

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[15] *See also* Ariz. Rev. Stat. § 13-2508 (defining "resisting arrest" as, *inter alia*, preventing an officer from effecting an arrest through "any . . . means creating a substantial risk of causing physical injury to the peace officer or another"); Cal. Health & Safety Code § 42400.3.(b) (criminalizing air pollution "that results in any unreasonable risk of great bodily injury to, or death of, any person"); Fla. Stat. § 1006.135(3) (defining hazing to require proof of "a substantial risk of physical injury or death to such other person"); N.Y. Penal Law § 145.45 (tampering with a consumer product in the first degree requires proof of "a substantial risk of serious physical injury to one or more persons"); *id.* § 490.47 ("criminal use of a chemical weapon or biological weapon" requires proof of "a grave risk of death or serious physical injury to another person not a participant in the crime").

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In The
Supreme Court of the United States

LARRY BEGAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING THE PETITIONER

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with a direct national membership of more than 12,000 attorneys, in addition to more than 35,000 affiliate members from all 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958. Its mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. In furtherance of this and its other objectives, NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.[1]

STATEMENT OF THE CASE

The district court applied the Armed Career Criminal Act's ("ACCA") mandatory minimum sentence to Petitioner Larry Begay based on Mr. Begay's present possession of a firearm, coupled with his prior New Mexico state convictions for driving while intoxicated ("DWI").

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored any part of the brief, and no person or entity other than an *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

The ACCA mandates imposition of a fifteen-year minimum sentence and raises the maximum sentence from ten years to life for violators of 18 U.S.C. § 922(g)(1) and § 924(a)—that is, convicted felons who knowingly possess a firearm—who have three prior convictions for a drug trafficking offense or a "violent felony." 18 U.S.C. § 924(e)(1). Section 924(e)(2)(B)(ii) provides that a "violent felony," in addition to crimes having as an element the use of physical force against another, means an offense that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

The district court rejected Mr. Begay's sentencing arguments and found that the offense of DWI in New Mexico, when committed by a recidivist who therefore faces more than a year's imprisonment, is a "violent felony" for purposes of the ACCA. The Court applied the fifteen-year mandatory minimum sentence under the ACCA to Mr. Begay, sentencing him to 188 months. Mr. Begay appealed and a divided panel of the Tenth Circuit affirmed on that point, remanding only for reconsideration of the weight given the Guidelines floor in light of this Court's recent cases.

SUMMARY OF ARGUMENT

In concluding that felony DWI presents a serious potential risk of physical injury to another, the sum total of the Tenth Circuit's analysis was as follows: "DWI certainly presents such a risk. Many would say that the gravest risk to their physical

safety from criminal misconduct is from drunken drivers." *United States v. Begay*, 470 F.3d 964, 971 (10th Cir. 2006). The Tenth Circuit's reliance upon its own subjective perception of presumed public opinion is misplaced and illustrative of the constitutional risks that inhere when courts engage in judicial factfinding -- particularly when that factfinding is uninformed by available statistical evidence.

In reality, drunk driving – while far more risky than driving sober -- is less of a contributing factor to injuries resulting from automobile accidents and much less dangerous to the physical safety of others than is commonly believed. Official statistics disclose that alcohol is "involved" at all in only about two percent of all motor vehicle crashes.[2] Other driving behaviors pose a significantly greater risk of causing a crash. For example, drowsy driving is a contributing factor in 22 to 24 percent of crashes and near crashes and distracted driving accounts for more than 22 percent of all crashes and near crashes.[3] Most important for present purposes, the

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[2] U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *National Survey of Drinking and Driving Attitudes and Behaviors, 2001*. TRAFFIC TECH 280, at 2 (2003)[hereinafter TRAFFIC TECH], *available at* http://www.nhtsa.dot.gov/people/injury/research/traffic-tech2003/TT280.pdf. For an elaboration of the counter-intuitive meaning of the concept "involved" as used by NHTSA in this context, *see* note 20 *infra* and accompanying text. For an explanation of the term "crash" as used by NHTSA, *see* note 5 *infra*.

[3] U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 810 594, THE IMPACT OF DRIVER INATTENTION ON NEAR-CRASH/CRASH RISK: AN ANALYSIS USING THE 100-CAR

risk that a drunk driving episode will result in an injury to someone other than that driver is less than three tenths of a percent (0.0025%) or one in 386 DWI episodes.[4]

Application of the ACCA to recidivist DWI offenders such as Mr. Begay can result in extraordinary increases in the otherwise applicable sentence. Accordingly, the determination of whether felony DWI is a "violent felony" under the ACCA must be based upon a clear-eyed assessment of the real risk of physical injury to another that DWI poses and not upon a court's impression of public opinion.

NATURALISTIC DRIVING STUDY DATA, at x (2003)[hereinafter IMPACT OF DRIVER INATTENTION]. *available at* http://www-nrd.nhtsa.dot.gov/departments/nrd-13/810594/images/810594.pdf.

[4] Evidence in Support of Def.'s Objection to Penalty Enhancement at 19, *United States v. Vela-Ornelas*, Case No. EP-00-CR-885-H (W.D.Tx. 2000)[hereinafter Zador Affidavit] attached as Appendix A. The same statistics show, moreover, that a drunk driver will kill someone other than himself only once out of every 21,000 drunk driving episodes (less than one-half of one-hundredth of a percent of all episodes). *Id.*

ARGUMENT

I. STATISTICS REGARDING THE POTENTIAL RISK OF INJURY TO ANOTHER POSED BY DWI ARE AVAILABLE AND RELEVANT TO A DETERMINATION OF WHETHER DWI IS A "VIOLENT FELONY" WITHIN THE MEANING OF THE ACCA.

In *James v. United States*, 550 U.S. --, 127 S.Ct. 1586, 1593 (2007), this Court addressed the question of whether attempted burglary constitutes a "violent felony" within the meaning of 18 U.S.C. § 924(e)(2)(B)(ii). The majority opinion in *James* acknowledged that when relevant statistics are available, they should inform courts' risk assessments under the ACCA. *See James*, 127 S.Ct. at 1598. With regard to drinking and driving, there is a wealth of raw data and statistical analysis available. In order to obtain meaningful statistics, however, it is first necessary to define the parameters of the analysis.

In determining whether a particular offense falls under the rubric of the "otherwise" clause of the ACCA, courts must employ the "categorical approach" set forth in *James*, 127 S.Ct. at 1593, and its antecedents. Under the categorical approach, courts may "'look only to the fact of conviction and the statutory definition of the prior offense,'" without recourse to the "particular facts disclosed by the record of conviction." *Shepard v. United States*, 544 U.S. 13, 17 (2005) (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)). This approach thus

requires courts to "consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender." *James*, 127 S. Ct. at 1594.

Recidivism is not an element of the DWI offense, at least in New Mexico, as it "does not relate to the commission of the offense, *but goes to the punishment only . . ..*" *Almendarez-Torres v. United States*, 523 U.S. 224, 244 (1998) (quoting *Graham v. West Virginia*, 224 U.S. 616, 629 (1912)). New Mexico's criminal code provides that first, second and third DWI convictions under N.M. Stat. § 66-8-102 (1978) constitute misdemeanors. N.M. Stat. § 66-8-102(E) & (F) (1978). Fourth or subsequent DWI convictions are treated as felonies punishable by a custodial sentence exceeding a year. N.M. Stat. § 66-8-102(G) (1978); N.M. Stat. § 31-18-15(A)(6) (2001). Because New Mexico's recidivist DWI statute is a punishment provision and does not add an element to the offense definition, this Court must, under the categorical approach, determine whether the elements of N.M. Stat. § 66-8-102 (1978), standing alone, meet the requirements of the residual clause. Thus, the relevant statistical analysis addresses the probability that a single drunk driving episode will lead to physical injury to another.

II. THE RISK THAT A SINGLE DWI EPISODE WILL LEAD TO INJURY TO ANOTHER PERSON IS EXTREMELY LOW.

The National Highway Traffic Safety Administration ("NHTSA"), a division of the Department of Transportation, compiles data related to traffic safety and motor vehicle crashes.[5] In addition, NHTSA solicits and sponsors traffic safety-related empirical research by various organizations. NHTSA's raw data is accessible to independent researchers also. Among the information gathered by the NHTSA are data relating to drinking and driving.

According to a 2001 survey conducted by the Gallup Organization on behalf of the NHTSA, drivers made a total of between 809 million and 1 billion driving trips in the United States in the year 2000 within two hours of consuming alcohol.[6] Relatedly, extrapolations from Centers for Disease Control and Prevention ("CDC") surveys reveal that in 2002, drivers took approximately 159 million driving trips after having (in their own estimation) "had perhaps too much to drink."[7] Using such

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[5] The NHTSA and most highway safety experts use the term motor vehicle "crash" in place of the more colloquial "car accident." *See* Zador Affidavit, *supra* note 4, at 9-10

[6] TRAFFIC TECH, *supra* note 2 at 1.

[7] Kyran P. Quinlan, M.D., MPH, *Alcohol-Impaired Driving Among U.S. Adults 1993-2002*, 28 Am. J. Preventive Med. 346, 348 (2005).

estimates, experts can assess the probability of various harms caused to another by alcohol-impaired drivers per incident of drunk driving.

Dr. Paul Zador, a research statistician and alcohol researcher holding a Ph.D. in mathematical statistics from Stanford University, has spent more than two decades conducting research regarding motor vehicle crashes associated with alcohol-impaired driving. Dr. Zador is affiliated with Westat, Inc., an employee-owned research corporation that provides statistical analysis to federal, state, and local governments, foundations and businesses.[8] Dr. Zador had occasion to estimate the risk that intoxicated driving will result in harm to another person when he prepared and submitted an expert report in connection with the sentencing proceedings in *United States v. Vela-Ornelas*, Case No. EP-00-CR-885-H, a Western District of Texas, El Paso Division case.

In his affidavit filed in 2000 using then available data, Dr. Zador analyzed NHTSA crash information in light of estimates of the self-reported incidence of impaired driving.[9] Using this data, Dr. Zador estimated that "five one thousands of one percent of all DWI episodes, or less than one out of

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[8] Zador Affidavit, *supra* note 4, at 21-27; *see also* www.westat.com (last visited Nov. 11, 2007).

[9] *Id.* at 17. Dr. Zador recognized that survey participants may have under-reported drinking and driving episodes. Nonetheless, Dr. Zador used the more conservative under-reported number in calculating the risks of death or injury.

every 21,000 DWI episodes[10], resulted in a fatal injury to someone other than the intoxicated driver or an intoxicated non-occupant." According to Dr. Zador's analysis, there was one fatality per 188,333 episodes[11] of driving within two hours of drinking. In his affidavit, Dr. Zador calculated the risk of any personal injury to someone other than the impaired driver per DWI episode at 0.0025%, just under three tenths of one percent. This equates to one injury per 386 DWI episodes and one injury per 3395 self-reported episodes of driving within two hours of drinking.[12] All of these figures reveal levels of risk of "physical injury to another" as a result of drunk driving which are more than 15 times lower than the 3.8% risk of violence arising out of a burglary that this Court characterized as "only rarely" in

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[10] *Id.* at 18-19. Dr. Zador calculated this figure by dividing the number of DWI episodes (90,000,000) by the number of fatalities to someone other than an intoxicated driver or intoxicated non-occupant (4200).

[11] *Id.* Dr. Zador reached his estimate of 188,333 by dividing the number of episodes of driving within two hours of drinking (791,000,000) by the number of fatalities to someone other than an intoxicated driver or intoxicated non-occupant (4200). The reference in Dr. Zador's affidavit to "188,333 thousand episodes" is a typographical error.

[12] *See id.* These figures are calculated by dividing the number of DWI episodes (90,000,000) by the total number of reported injuries (233,000). The rate of injury per incidence of driving within two hours of drinking is calculated by dividing the total number of reported driving within two hours of drinking episodes (791,000,000) by the total number of reported injures (233,000).

Tennessee v. Garner, 471 U.S. 1, 21 (1985).[13] Dr. Zador's calculations as they appeared in his affidavit are forth out below:

Table 2: Rate of harm caused to another per 100 episodes of DWI and driving within two hours of drinking, by harm severity. [14]

	Type of episode, N	
Harm severity, N	DWI, 90,000,000	Driving within two hours of drinking, 791,000,000
Fatal, 4,200	0.005	0.0005
Injury, 233,000	0.260	0.029
Property damage only, 259,000	0.290	0.033
Total, 491,000	0.540	0.062

In performing his statistical analysis, Dr. Zador recognized and adjusted for limitations of the NHTSA data so as to provide conservative risk

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[13] Even if the Congressional inclusion of burglary as a *per se* violent offense under the ACCA were deemed to imply some sort of acceptance of 3.8% as a measure of unacceptable risk, the statistics show that the risk of injury from DWI is 15 times lower (0.038/0.0025 = 15.2). *Cf. Leocal v. Ashcroft*, 543 U.S. 1 (2004) (for lack of mens rea element, Florida DUI is not "crime of violence" under 18 U.S.C. s 16(b))

[14] This table was titled "Table 2" in Zador's Affidavit, *supra* note 4, at 19.

estimates. For example, the NHTSA includes within its injury estimates injuries ranging from minor to fatal. This results in double counting of fatalities.[15] In addition, NHTSA does not segregate nonfatal injuries to intoxicated drivers and intoxicated non-occupants as it does for fatalities[16]. Thus, according to Dr. Zador, his estimates of the risk of injury to a person other than an intoxicated driver or intoxicated non-occupant "are likely to overestimate damage to another by as much as a factor of three."[17]

Importantly, Dr. Zador was charged with determining the risk of injury to *another* from drinking and driving. As a result, Dr. Zador excluded from his calculations deaths of intoxicated drivers and intoxicated non-occupants. Statistics show that a drunk driver is far more likely to kill himself in a crash than anyone else.[18] NHTSA, of course, includes such deaths in its fatality counts.[19]

Most significantly, NHTSA's expansive crash coding definitions give rise to marked overstatement

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15 *Id.* at 14-15.

16 *Id.*

17 *Id.* at 13.

18 *See* U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 810 821, *2006 Traffic Safety Annual Assessment – Alcohol-Related Fatalities*, TRAFFIC SAFETY FACTS RESEARCH NOTE, Aug. 2007, at 1 [hereinafter *2006 Annual Assessment*], *available at* www-nrd.nhtsa.dot.gov/Pubs/810821.pdf.

19 Zador Affidavit, *supra* note 4, at 15.

of risk. For example, NHTSA codes a crash as "alcohol related" even if all drivers were sober but a non-occupant – such as an injured pedestrian or bicyclist -- had a positive blood alcohol concentration ("BAC").[20] A fatal crash is deemed by NHTSA to be "alcohol related" when it involves a participant with a BAC as low as .01 grams per deciliter (g/dl) or higher.[21] All states, the District of Columbia and the Uniform Vehicle Code now set the threshold for a finding of a per se DWI violation at .08 BAC.[22] Under this NHTSA definition, however, a fatal accident will be deemed "alcohol related" even if only a single person involved in the crash had a BAC of .01, whether he was the driver or not. For NHTSA to identify a crash resulting in injury as "alcohol related," police must merely report it as such. No objective criteria need be met and police need not make a finding of driver impairment.[23] For this

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[20] *Id.* at 10.

[21] U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 810 631, TRAFFIC SAFETY FACTS 2005: A COMPILATION OF MOTOR VEHICLE CRASH DATA FROM THE FATALITY ANALYSIS REPORTING SYSTEM AND THE GENERAL ESTIMATES SYSTEM, at 56 [hereinafter TRAFFIC SAFETY FACTS 2005], *available at* http://www-nrd.nhtsa.dot.gov/Pubs/TSF2005.pdf.

[22] U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 810 571, DIGEST OF IMPAIRED DRIVING AND SELECTED BEVERAGE CONTROL LAWS, April 2006, *available at* http://www.nhtsa.dot.gov/people/injury/alcohol/ImpairedDrivingBeverageControlDigest.pdf.

[23] TRAFFIC SAFETY FACTS 2005, *supra* note 21 at 56; Zador Affidavit, *supra* note 4, at 10.

reason, Dr. Zador limited his analysis to those crashes in which BAC exceeded the legal limit, producing figures which are far more useful and reliable for purposes of examining risk under the ACCA's "otherwise" clause.[24]

In short, none of the available data, when viewed in light of the criteria made pertinent by the ACCA's "otherwise" clause, suggest that DWI poses a "serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

III. DISTRACTED DRIVING AND DROWSY DRIVING CAUSE MANY MORE MOTOR VEHICLE CRASHES THAN DOES ALCOHOL.

In 2002, the NHTSA undertook a "nationally representative survey of drivers in order to collect data on the nature and scope of the distracted driving problem . . .."[25] Approximately 3.5 percent of drivers have been involved in a motor vehicle crash in the previous five years that they attribute to

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[24] At the time Dr. Zador performed his analysis, the legal limit in the majority of states was .10 BAC. Although Dr. Zador noted a trend toward instituting a .08 BAC threshold, he explained that "conclusions based on the .10 percent threshold will not materially differ from conclusions based on the lower, and more inclusive, threshold." Zador Affidavit, *supra* note 4, at 10-11.

[25] U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 809 566, NATIONAL SURVEY OF DISTRACTED AND DROWSY DRIVING ATTITUDES AND BEHAVIOR: 2002 VOL. I, at 1 (2003).

having been distracted.[26] Some of the distracting behaviors drivers cited as causing crashes include looking for something inside or outside the car, dealing with children, looking at an animal outside the car and dealing with technology such as a radio.[27] Another .1 percent of all drivers attribute a crash they have had to cell phone use.[28] Fully .7 percent of drivers attribute a crash in the past five years to drowsy driving.[29] Thus, in total, 4.3 percent of all drivers have had a crash within the past five years attributable to distracted or drowsy driving.

Following up on this data, in April 2006, the NHTSA published a study quantifying the impact of distractions and drowsiness on driver safety. In particular, the study assessed the causal role of drowsy and distracted driving on motor vehicle crash risk. The study concluded that "driving while drowsy was a contributing factor for 22 to 24 percent of the crashes and near-crashes . . .."[30] Further, "secondary-task distraction contributed to over 22 percent of all crashes and near crashes."[31] By

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26 *Id.*

27 *Id.* at 3.

28 *Id.*

29 *Id.* at 5.

30 IMPACT OF DRIVER INATTENTION, *supra* note 3 at 8.

31 *Id.*

comparison, alcohol was involved in about two percent of reported crashes.[32]

CONCLUSION

The question in this case, is not whether it is a good idea to drink and drive. The question presented in this case is whether a felony DWI episode involves conduct that presents a serious potential risk of physical injury to another such that a mandatory minimum fifteen year sentence is warranted when a person with a history of such convictions is found to possess a firearm. 18 U.S.C. § 924(e)(2)(B)(ii).

Private advocacy groups and indeed the federal government, publicize data regarding "alcohol related" crashes and fatalities. A layperson might conclude that "alcohol related" means "alcohol caused." Such is not the case. The broad definition of "alcohol related" means that many crashes that are not attributable to alcohol use at all will appear to fall within that category. The overinclusive definition of "alcohol related" thus results in overstatement of the actual statistical risks of DWI. Even under this broad definition, statistics show that the probability of a given drunk driver harming someone else is very low. Indeed, distracted driving and drowsy driving – which no one would call "violent" -- have each been implicated in far more motor vehicle crashes than has alcohol.

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[32] TRAFFIC TECH, *supra* note 2, at 2.

Although the public perception is that drunk drivers pose an extraordinary risk to others, the reality is that other common driving behaviors are much more likely to result in a crash. Indeed, the statistical risk that a drunk driver will injure or kill another person is quite low. Moreover, a drinking driver poses a greater hazard to himself than to anyone else. In short, notwithstanding the public perception, felony DWI does not pose a serious potential risk of physical injury to another and accordingly does not fall within the definition of a "violent felony" set forth in the ACCA.

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FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	)
	) CAUSE
v.	) NO. EP-00-CR-885-H
	)
JULIO CESAR VELA-ORNELAS	)

EVIDENCE IN SUPPORT OF DEFENDANT'S OBJECTION TO PENALTY ENHANCEMENT

Defendant, Julio Cesar Vela-Ornelas, by his attorney attaches Defendants' Exhibit 1, Affidavit by Dr. Paul Zador, in support of his Objection to Penalty Enhancement.

[Seal of Clerk]

Dr. Paul Zador

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AFFIDAVIT

Estimating the risk that Driving While Intoxicated (DWI) will lead to an accident harming another's person or property

1. My name is Paul L. Zador. I hold a Ph.D. in Statistics from Stanford University. I am a research statistician and alcohol researcher, with more than 30 of years experience in interdisciplinary research. I am familiar with all of the important studies on the risks of drinking and driving. Over the past two decades, I have conducted and published numerous respected and influential studies on motor vehicle crashes associated with alcohol-impaired driving. I have also evaluated the effectiveness of various legal and public health measures that are designed to reduce alcohol-impaired driving. You may consult my attached professional biography, attached hereto as Exhibit 1, for additional details of my alcohol research expertise.

2. I write this affidavit as an expert witness for the defense. Defense counsel has asked me generally to perform two tasks: First, to point out flaws in the use of statistics in an immigration court opinion entitled *Matter of Magallanes*. Second, to give a reasoned, reliable answer to the underlying fact question, "What is the probability that an episode of DWI will cause a crash involving harm to the person

or property of another?" Most of this affidavit's content is taken from an affidavit I prepared for Mr. William Maynard, defense attorney, in 1999 on the same question in another case.

3. Prior to preparing this affidavit, I have conferred with Mr. Maynard and I have reviewed :

(1) the relevant laws (8 U.S.C. § 1101(a)(43) and 1326, 18 U.S.C. § 16),

(2) a ruling from the Board of Immigration Appeals entitled *Matter of Magallanes*..

4. Based on my understanding of these documents and my conversations with Mr. Maynard, I understand that the primary issue in this litigation is whether felony DWI is a "crime of violence" under 18 U.S.C. § 16(b). I understand that there are underlying legal issues of statutory interpretation. For purposes of this affidavit I have treated the question, "Does felony DWI involve, by its nature, a substantial risk that physical force against the person or property of another may be used in the course of its commission?"
as if it were phrased,

"Does felony DWI involve, by its nature, a substantial risk of accidental harm to the person or property of someone other that the drinking driver?"

5. As a statistician and alcohol researcher, I understand that the answer to the question depends on an underlying fact question: "What is the probability that an episode of driving while intoxicated by alcohol will cause a motor vehicle crash involving harm to the person or property of another?"

6. I should preface my answer by explaining that there is no **valid national** study in existence which answers this specific question. There are no valid national studies which calculate the probability that an episode of DWI will cause a motor vehicle accident or one involving harm to another's person or property. Thus, the only way to try answer this question is to infer from data in studies of other characteristics of drinking, driving, and highway safety.

7. Whenever possible, statisticians use proportions to estimate probabilities. To calculate a proportion, one starts with a set of units that are classified on some property, and compares the number of units that has the property with the total number of units. A reasonable, and customary, approach is to identify episodes of DWI[1] as the units and compare the number of crashes meeting certain criteria with the total number of episodes meeting the same criteria. The ratio relevant for estimating risk is formed by dividing two counts:

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1 A trip during part of which the driver was at or above the *per se* BAC limit or otherwise impaired is called an episode of DWI.

$$\frac{\text{\# of crashes in which driver committing DWI caused harm to anothers' person or property}}{\text{\# of DWI episodes}}$$

How large a probability of a harmful event must be to justify calling it a substantial risk involves questions of law or subjective values, which are matters beyond research data. However, estimating numeric values for various harmful consequences associated with motor vehicle crashes is a matter to which statistical evidence is clearly relevant. Note, however, that it would not be desirable to set the probability threshold for 'substantial risk' so low as to include the youngest and oldest drivers whose fatal per mile crash risk is several times higher than the national average of fatal per mile crash risk. I would further note that the Eighth Special Report to the U. S. Congress on Alcohol and Health from the Secretary of Health and Human Services, (1993), grouped fatal automobile crashes with other unintentional injury deaths for purposes of comparison with intentional injury deaths (homicides and suicide).

8. Critique of statistics asserted in *Magallanes*. Before providing my own estimates, I will review the material that *Magallanes* presented in support of an affirmative answer to the question whether a felony DWI involves, by its nature, a substantial risk of accidental harm or physical force against the person or property of another..

Magallanes limits the evidence to data on aggregate damage associated with alcohol-related crashes, or with crashes involving alcohol. It makes no

attempt to quantify the size of the risk exposure. With no reference to a denominator, estimates for the numerator are not sufficient for estimating the size of the risk for the damage caused by felony DWI.

Focusing on some aggregate quantity in the numerator, while disregarding the denominator, is like ignoring portfolio size when considering total portfolio return. Yet, whether $10,000 was a return on an investment portfolio of $20,000, or on an investment portfolio $2,000,000, clearly makes a difference to the investor.

Moreover, many of the aggregate statistics cited in these documents are incorrect, or are not correctly interpreted.

Assertion. (in *Magallanes*). Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million injuries and more than five billion dollars in property damage (Cited from Michigan State Police v. Sitz, 496 U.S. 444, 451, 1990).

Analysis. The number 25,000 is a crude estimate for the average total number of yearly fatalities in which the highest BAC was at or above 0.01 percent during the early 1980s, a period when drunk driving was far more common that since the mid-80s. In 1993, for example, there were 17,473 fatalities in crashes in which the highest BAC was at or above 0.01 percent, and of these, approximately 14,000 occurred in crashes in which the highest BAC also exceeded 0.10 percent – the typical threshold for DWI in 1993. About 55 percent of these intoxicated

drivers caused their own death and another 14 percent of the victims were pedestrians or bicyclists, themselves with a BAC at or above 0.10 percent. The remaining roughly 30 percent of the 14,000 drivers, about 4,200 drivers, caused the death of another. This is still a huge number, but it is less than 20 percent of the 25,000 claimed. The estimates for injuries and property damage are similarly exaggerated. Clearly, drivers committing DWI predominantly kill themselves, not others.

Assertion. (in *Magallanes).* Driving under the influence vastly increases the probability that the driver will injure someone in an accident. (Cited from United States v. Rutherford, 54 F.3d 370, 376 (7-th Cir.))

Analysis. My own research showed that each BAC increase of 0.02 percent approximately doubles the risk of being involved in a fatal single-vehicle crash, and almost doubles involvement in other types of crashes as well (Zador, 1991). This means that having elevated BAC increases the risk of being involved in a crash relative to not having elevated BAC. Since this increase in risk is large, it is valid to say that high BACs substantially increase the *relative* risk of causing a crash. The fact question, however, defines crimes of violence in terms of the *probability* of causing a crash and not in terms of *increases in that probability*. Therefore, even a vast increase in probability cannot, without reference to the absolute level of that probability, meet the statutory requirement of proving substantial risk.

9. Summary of definitions and methodology for calculating risk. Before reviewing the statistical evidence concerning the probability of a crash associated with an episode of impaired driving, I'll first clarify what is meant by "driving while intoxicated" and "causing a motor vehicle crash involving harm to the person or property of another." I will also review the available data sources, as well as the relationship between the data and the concepts implied by the fact question.

The statutory definition of DWI varies among states, and within a state, it may vary over time. In 1993, almost all states had *per se* laws defining it as a crime to drive with a blood alcohol concentration (BAC) at or above a proscribed level, usually 0.10 percent. In 1993, the proscribed BAC level in Arizona was 0.10 percent for adults and 0.00 percent for drivers under age 21. While there has been an ongoing trend among states to lower the proscribed level, as recently as in 1996, only 14 states had instituted the typical next lower proscribed level of 0.08 percent. In addition to applying the *per se* definition, most states also permit the prosecution of drivers committing a DWI based on evidence of driver impairment that the arresting officer can observe directly or by conducting a field sobriety test.

The fact question refers to "motor vehicle crashes," rather than to "motor vehicle accidents." The use of the term "crash" has been adopted by the National Highway Traffic Safety Administration (NHTSA) and by most highway safety experts to emphasize that each crash must be presumed to have one or more causes, and cannot be viewed as

just an accidental occurrence. However, determining the cause of any specific crash is a resource-intensive activity requiring on-site investigations by well-trained experts, and there are no reliable national statistics on the prevalence of causes for motor vehicle crashes. For this reason, the precise number of crashes caused by drivers committing a DWI is simply not known, and the amount of harm caused to others is known even less. It is, however, possible to generate statistical estimates relevant for the numerator of the risk ratio by using two national data systems maintained by NHTSA, the Fatality Analysis Reporting System (FARS) and the General Estimates System (GES).

Ultimately, the data in both FARS and GES come from the police. FARS is a census of all motor vehicle crashes that occur on public roads in the United States and result in a fatality within 30 days. GES obtains its data from a nationally representative probability sample selected from all police-reported crashes that occur nationally. These crashes include those that result in a fatality or injury and those involving major property damage. In describing the data in GES, NHTSA notes that "[a]lthough various sources suggest that about half the crashes in the U. S. are not reported to the police, the majority of these unreported crashes involve only minor property damage and no significant personal injury. By restricting attention to police-reported crashes, the GES concentrates on those crashes of greatest concern to the highway safety community and the general public." (p. 2. U.S. DOT, 1991). Also, generally, the more violent a crash, the greater the likelihood that alcohol is a

factor; and drivers with illegal BACs are involved in only a small percentage of "fender-benders" ... (Baker et al., 1992, p.253). Thus, disregarding crashes that are not reported to the police excludes only crashes that caused relatively little harm, and in which few of the drivers had an illegal BAC. Therefore, it is justified to limit crashes to those included in FARS and in GES, and I will do so.

Using careful data collection and sophisticated statistical methods, NHTSA is able to determine, or at least estimate, the numeric value of the BAC of every person actively involved in a fatal crash.[2] For purposes of reporting these data, NHTSA identifies fatal crashes as alcohol-related if the highest BAC in the crash is at or above 0.01 percent. This means that even if the highest BAC in the crash was 0.01 percent, NHTSA would call it alcohol-related. Fortunately, NHTSA also reports crashes by the highest BAC in the crash. I note that according to NHTSA's definition, a crash is alcohol-related even if all drivers were sober but a non-occupant, that is a pedestrian or a bicyclist, had a positive BAC. BAC data are not available for most crashes in GES; instead alcohol involvement "is coded by police when evidence of alcohol is present" (p. 131. U.S. DOT, 1991). Since most states set their *per se* limit at 0.10 percent, it is reasonable to identify drivers committing a DWI as those drivers whose BAC was at or above the 0.10 percent at the time of their crash. FARS provides frequency counts for these drivers. Though a few states now use 0.08 percent as the *per se* limit, as of

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2 This term refers to drivers or non-occupants, that is pedestrians and bicyclists.

now NHTSA has not switched to publishing statistics for this more inclusive group. My own recent work shows that only about 4 percent of drivers in a fatal single-vehicle crash had a BAC between 0.08 and 0.10 percent, so that conclusions based on the 0.10 percent threshold will not materially differ from conclusions based on the lower, and more inclusive, threshold. While it is not possible to differentiate alcohol crashes involving alcohol from crashes in which a driver committed a DWI based on data in GES, drivers for whom the police reported alcohol involvement are likely to include most of the drivers with a high BAC. My own research shows that at checkpoints, police officers are able to identify a majority of drivers with a BAC of 0.10 percent or higher.

"Caused ... to another" in the numerator for estimating the probability includes only crashes in which the driver committing DWI caused harm to another in the crash *and* that driver's BAC was, in turn, the proximate cause of that driver's mistake. How should one estimate this number starting with data on police-reported fatal crashes involving alcohol? The following three-step procedure is conceptually sound, and the first two steps are feasible.

- First, limit crashes to those in which a BAC exceeded the proscribed level.
- Second, exclude crashes in which the harm was caused not to another but to the person with the illegal BAC as well as the crashes in which the non-occupant victim had an illegal BAC.

Third, one ideally would also like to exclude the crashes that would have occurred even if the driver with the illegal BAC did not have an illegal BAC either because the crash was not caused by the driver, or because the same driver would have caused it even when sober

Strictly speaking, the data are inadequate to exclude the third class of crashes. This failure will cause the number of fatal crashes attributed to drivers with an illegal BAC to be overestimated[3]. However, since the alcohol-related relative fatal crash risk is very high for drivers at an illegal BAC at or above a 0.10, the extent of this over-attribution is not large enough to make a material difference in the size of the numerator. I note that this would not be so for BACs that are below 0.10 percent[4]. I will derive our estimates for fatal crashes using the first two steps above.

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3 A highly respected alcohol researcher, Leonard Evans stated in his book entitled Traffic Safety and the Driver (p. 183, 1991) that "The press often reports that alcohol is involved in about half of all fatal crashes. While true, this does not address what role alcohol plays. Undoubtedly, coffee is involved in nearly all fatal crashes, yet eliminating coffee is unlikely to have much of a role on traffic crashes."

4 For BACs below 0.10 percent, it would be misleading to attribute all crashes to impairment by alcohol. At a BAC just above 0.01 percent, there is little or no impairment so that few, if any, of those crashes should be attributed to alcohol. As driver BAC rises, so does impairment and at or above 0.05 percent, a majority of, but still not all, crashes could be legitimately attributed to impairment. Note, however, that in 1998, only about 22 percent of all drivers who were fatally injured in an alcohol-related crash were fatally injured in a crash in which the highest BAC was below 0.10 percent.

Because of data limitations in GES, I will rely on a much more conservative approach for estimating the numerator for police-reported injury-producing and property-damage-only crashes. First, I will limit crashes to those that reportedly involved alcohol since there are no data to exclude crashes in which the driver BAC did not exceed 0.10 percent. Second, I will include all crashes in the numerator, not only those in which the damage was to another, since there is no published data for identifying victims by driver BAC. Not limiting the count to sober victims may result in over-estimating the number in the numerator for non-fatal crashes by as much as a factor of three[5].

I summarize the salient features of these definitions, as they affect estimation:

"Crash (or Accident)" refers to police-reported traffic events on public highways in which one or more motor vehicles cause damage to vehicles, objects, persons, or animals. Crashes range in severity from the most serious (fatalities) to the least serious (fender benders). Virtually all fatal crashes are reported to the police, but some minor crashes remain unreported.

"Harm" means property damage or personal injury.

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5 Here is a way to make a speculative adjustment: determine the proportion of fatal crashes in which the driver with an illegal BAC caused harm to another and apply that proportion to the total number of crashes involving alcohol. This assumes that the split between harm to oneself and to another is the same in fatal crashes as in injury and property damage only crashes. Note that in only about 30 percent of all fatal crashes involving an illegal BAC is the harm to a sober victim.

"Caused" means the numerator should include only accidents in which the drinking driver caused the accident *and* the driver's BAC was, in turn, the proximate cause of that driver's mistake. However, for lack of relevant data, I could not exclude crashes in which the sober driver was at fault or alcohol was not a factor.

"Another's" means the driver with BAC must not only be at fault, but he must injure another person or damage another's property. Specifically, this excludes one-vehicle crashes in which the drinking driver or pedestrian is the only victim.

"DWI" is defined by state laws that include a *per se* definition with a proscribed level typically at a BAC of 0.10 percent and some language prohibiting driving while one's abilities are impaired by alcohol consumption.

"Alcohol involvement" is defined as police-reported alcohol involvement in the crash.

"Alcohol-related crash" is defined by NHTSA as a crash in which the highest BAC is at or above 0.01 percent.

10. Estimating the number of Fatalities caused to another by a driver with a BAC at or above 0.10 percent.

An intoxicated driver committing a DWI may cause damage to himself or herself or to another. According to NHTSA, there were a total of 12,456

fatalities in fatal crashes involving at least one intoxicated driver committing a DWI in 1998 (see Table 1). The majority, 56 percent, among these fatalities were the drivers themselves. This left 5,446 fatalities, or 44 percent of the total, who were not themselves intoxicated drivers. This last group also included 1,739 (14 percent) intoxicated non-occupants. Excluding the latter group, this leaves a total of 3,707 fatalities who were victims of intoxicated drivers committing a DWI. This comes to about 30 percent of all fatalities in fatal crashes involving at least one intoxicated driver.

The above estimate includes all fatalities who were themselves not intoxicated drivers or intoxicated non-occupants. This estimate excludes the 7,010 intoxicated drivers who themselves became traffic fatalities. The majority, or 5,214, among the latter died in single-vehicle crashes that did not involve other drivers, only themselves. The remaining 1,796 died in crashes that involved at least one other driver who may or may not have been intoxicated. Nonetheless, their exclusion is justified because they themselves were committing a DWI at the time of the crash.

In 1993, there were a total of 13,977 fatalities in fatal crashes involving at least one intoxicated driver, 12 percent more than in 1998. In my best judgment, intoxicated drivers committing a DWI caused fatal injuries to another and not to themselves or to an intoxicated non-occupant roughly in the same proportion in 1993 as in 1998. Therefore, I estimate that in 1993, there were about 4,200 fatal victims of intoxicated drivers committing a DWI. In other words,

fatal injuries caused to another by intoxicated drivers committing a DWI accounted for about 10 percent of the total number of 40,150 fatalities that occurred in 1993.

Table 1. Types of Fatalities in Fatal Crashes Involving at Least One Intoxicated Driver or Non-occupant, 1988[1]

Type of Fatality	#	%of Total
Total Fatalities	12,456	100
Intoxicated driver	7,010	56
Fatalities, other than an intoxicated driver	5,446	44
Intoxicated non-occupants (Pedestrians and Bicyclists)	1,739	14
Victims: fatalities who were neither intoxicated drivers nor intoxicated non-occupants	3,707	30

[1]U. S. Department of Transportation, National Highway Safety Administration .
Traffic Safety Facts 1998 (DOT HS 808 950)

Police-reported injury and property damage only crashes involving alcohol.

According to NHTSA's General Estimates System, there were a total of 6,110,000 police-reported crashes in 1991. The police coded the presence of some evidence for alcohol involvement by someone in the crash for 491,000, or 8 percent, of all crashes. Of all crashes, 4,073,000 resulted in property damage only, 1,681,000 in minor or moderate injury, and 357,000 in

severe or fatal injury. The percentage of crashes involving alcohol increased with increasing crash severity. Among the property damage only crashes, 6 percent (or 259,000) involved alcohol. The comparable figures for minor or moderate injury crashes, and for severe or fatal injury crashes were 10 percent (or 165,000) and 19 percent (or 68,000), respectively. Since these estimates include damage caused to intoxicated non-occupants and to the drivers themselves, they are likely to overestimate damage to another by as much as a factor of three. Also, since the estimates for severe and fatal injuries include fatalities, fatalities are double-counted.

Episodes of impaired driving

Researchers have estimated the annual frequency of impaired driving episodes from national surveys. According to Liu et al (1997), drivers reported driving about 123 million times during 1993 after "having had perhaps too much to drink." Since this estimate was based on self-reports, it is probably much lower than the true number of such episodes because some of the respondents may have been reluctant to admit to impaired driving. According to my own unpublished estimates for 1995, drivers admitted to being above the proscribed BAC level in their state in about 90 million episodes, and they admitted to almost 800 million episodes of driving within two hours of drinking. To put these estimates in context, drivers undertook a total of about 230 billion trips in the United States in 1995. Since almost 100 million of these involved a driver committing a DWI, and in almost 800 million the driver had a drink within two hours driving, roughly

one out of every 2,000 trips involved a DWI, and roughly one out of every 300 trips started within two hours of drinking. It is also worth noting that NHTSA (1998) estimated from data collected by Substance Abuse and Mental Health Administration, about 45 million drivers admitted to driving at least once within two hours of drinking in 1996.

Estimated probability of harm caused to another by alcohol-impaired drivers.[6]

Table 2 presents estimates for rate of harm per episode of self-reported DWI and episode of self-reported driving within two hours of drinking, by harm severity. As Table 2 shows, five one thousands of one percent of all DWI episodes, or less than one out of every 21,000 DWI episodes, result in a fatal injury to someone other than the intoxicated driver or an intoxicated non-occupant. There was one fatality per 188,333 thousand episodes of driving within two hours of drinking. Also, there was one crash per 183 DWI episodes and 1,611 episodes of drinking within two hours, respectively.

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6 The estimates provided here are substantially lower than those published by Miller et al in 1996. In my judgment, the estimates in Miller et al are vastly inflated, especially for non-fatal crashes. Because of limitations of space, I can only illustrate here the kind of erroneous assumptions that Miller et all make to derive their estimates. For example, they assumed, contrary to factual evidence, that drivers committing DWI cause non-fatal crashes in the same proportion as they do fatal crashes. As cited above, research evidence shows that alcohol plays a much smaller role in causing crashes of low severities than in causing fatal crashes. Among police-reported property-damage-only crashes only six percent involved alcohol, and the comparable percentage in non-police reported crashes was even less.

Table 2. Rate of harm caused[7] to another per 100 episodes of DWI and driving within two hours of drinking, by harm severity.

	Type of episode, N	
Harm severity, N	DWI, 90,000,000	Driving within two hours of drinking, 791,000,000
Fatal, 4,200	0.005	0.0005
Injury, 233,000	0.260	0.029
Property damage only, 259,000	0.290	0.033
Total, 491,000	0.540	0.062

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7 Number of events is limited to harm caused to another only for fatalities. Injury count combines all injuries from minor to fatal.

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/s/ Paul Zador
PAUL ZADOR

SWORN AND SUBSCRIBED TO BEFORE ME by the said PAUL ZADOR on this the 7th day of September, 2000

/s/ Patricia L. Lawrence
NOTARY PUBLIC
State of Maryland

Patricia L. Lawrence
Notary Public State of Maryland
My commission expires
September 1, 2002

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EXECUTIVE SUMMARY

Dr. Paul L. Zador, a research statistician, study design methodologist, and alcohol researcher, has more than 30 years experience in interdisciplinary research and reporting on the results. His expertise covers a wide range of statistical and econometric techniques, with special emphasis on the research design and data analysis issues that arise in evaluation studies. Over the past two decades, he conducted and published numerous influential studies on motor vehicle crashes associated with alcohol-impaired driving and evaluated the effectiveness of various legal and public health measures designed to reduce alcohol-impaired driving. His current research interests include estimating the prevalence of impaired driving in the United States and the causal role of alcohol-impairment in fatal motor vehicle crashes, evaluating the long-term effectiveness of measures against impaired driving, and evaluating the effectiveness of antidrug media campaigns to reduce drug abuse among children. Dr. Zador is an active

participant in the work of the Transportation Research Board's Committee on Alcohol, Other Drugs, and Transportation. He serves as a member of the National Institute of Health's (NIH's) National Institute of Alcoholism and Alcohol Abuse's (NIAAA's) Special Review Panel for grant applications. He was an invited guest editor of a special issue of *Alcohol, Drugs and Driving* on international perspectives on alcohol involvement in highway crashes.

ONGOING OR RECENTLY COMPLETED STUDIES

Alcohol-Related Relative Risk of Fatal Motor Vehicle Crashes. Among drivers, the relative risk of being involved in a fatal motor vehicle crash is known to rise rapidly with increasing driver BAC (Blood Alcohol Content; see Zador, 1991). Dr. Zador and associates used recent data from the 1996 National Roadside Breathtesting Survey of Drivers on driver *exposure* and from the Fatal Accident Reporting System maintained by the National Highway Traffic Safety Administration (NHTSA) on *fatal crashes* to refine and update relative crash risk estimates for different types of fatal crashes by driver age, gender, and BAC. The results of this publication will be published in *Journal of Studies on Alcohol* (Zador et al., May 2000). This work was funded by NHTSA.

Estimates far the prevalence of alcohol-impaired driving trips. Dr. Zador and associates estimated the extent of alcohol-impaired driving in the USA using self-reported information on drink-

and-drive episodes and arrests for drinking and driving (source: NHTSA's National Survey of Drinking and Driving Attitudes and Behavior) and administrative arrest records on arrests (source: FBI Uniform Crime Reports). The study compared prevalence estimates under alternative definitions of what constitutes drunk driving and provided an interpretive context for comparable previous estimates that were recently published in **the** *Journal* of *the American Medical Association (JAMA).* The results from this investigation will be published by NHTSA in a special report, and will also be submitted to JAMA for publication (Zador, Krawchuk and Moore, 1999). This work was funded by NHTSA.

Estimating Performance Impairment at Low Blood Alcohol Levels in Relation to Driver Characteristics - Dr. Zador is the co-investigator of a major randomized laboratory study designed to estimate the effect of positive blood alcohol levels on multiple driving-related performance measures by age, sex, and drinking experience. Dr. Zador participated in designing the study and writing the report; he was responsible for analyzing the data. A preliminary report of the findings is under review by the sponsoring agency (NHTSA).

Evaluation of the effectiveness of alcohol interlock devices. Dr. Zador is co-investigator and statistician in two ongoing randomized multi-year case-control studies designed to evaluate the long-term effectiveness of alcohol ignition interlocks (as an adjunct to other measures) to prevent drunk driving among repeat DWI offenders. Both studies

measure interlock effectiveness by comparing survival without re-arrest for a DWI offense between otherwise comparable repeat offenders with and without the interlock device. Study subjects will also be assessed on a range of alcohol-related attitudes and behavior. Dr. Zador participated in developing the research designs for these studies, and will be responsible for analyzing and interpreting the results. One of the two studies is funded by the National Institute of Alcoholism and Alcohol Abuse of NIH, the other by the National Highway Traffic Safety Administration (NHTSA) of the U.S. Department of Transportation.

Evaluation of the National Youth Anti-Drug Media Campaign (NYAMC). This major five-year evaluation study was designed to measure the long-term effectiveness of a national media campaign against the abuse of illegal drugs by children and youths. The data for this evaluation will be collected from parents and their children in eight cross-sectional national surveys and in four longitudinal surveys by Westat Inc.'s research team (Westat is an employee-owned survey research organization in Rockville, MD). Research results will be released on a regular basis and will be used to help frame the national dialogue on antidrug abuse policies. Dr. Zador and his associates will assess the causal impact of the antidrug media campaign using state-of-the art statistical techniques (that is, propensity modeling of exposure to campaign messages, estimation of growth curves to describe how individuals change over time, and so on). Dr. Zador participated in planning this study and will be responsible for conducting several of the planned

statistical analyses. This research is funded by the National Institute on Drug Abuse, NIH.

Persistent Effects of Treatment Studies (PETS). This multi-year research study is funded by the Center for Substance Abuse Treatment (CSAT), Substance Abuse and Mental Health Services Administration. PETS is a major initiative to assess the long-term (up to 3 years) effectiveness of substance-abuse treatment in the publicly funded treatment system. The major focus of PETS is to track the outcomes and continued progress of 7,000 clients over a 3-year period following treatment. Among other things, plans call for evaluating the clinical and cost effectiveness of substance-abuse treatment at both the individual and societal levels in terms of multiple outcome measures. A major focus of the project will be to develop standard methods for evaluating treatment outcomes. As a Westat senior analytic statistician, Dr. Zador is occasionally called on to review complex methodological issues. For instance, he has assessed the potential usefulness of meta-analytic techniques for combining long-term effectiveness estimates derived on the basis of disparate outcome measures.

EMPLOYMENT HISTORY

Senior Statistician, Westat, 1993-Present
Statistician, Insurance Institute for Highway Safety, 1972-1993
Principal Statistician, Computer Applications, Inc., 1966-1971
Member of the Technical Staff, Bell Telephone Laboratories, 1961-1966

EDUCATION

Ph.D., Mathematical Statistics, Stanford University, Stanford, California, 1964

- Dissertation: "Development and Evaluation of Procedures for Quantizing Multivariate Distributions"

B.A., Mathematics, Oxford University, Oxford, England, 1958

SELECTED REPORTS AND PUBLICATIONS

Zador, P.L., Krawchuk, Sh., Voas, R. (May 2000). Alcohol-related relative risk of fatal driver injury in relation to driver age and sex. *Journal of Studies on Alcohol, 61* (In press).

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